Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

October Term, 1998

CULT AWARENESS NETWORK,

Petitioner,

vs.

JASON SCOTT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment protection of freedom of association narrow the circumstances in which state tort and 42 U.S.C. §1985(3) derivative liability can be imposed against a non-profit advocacy organization to those where the organization authorized, had knowledge of or ratified the unlawful act upon which liability is based?

2. Does 42 U.S.C. §1985(3), like 42 U.S.C. §1983, require the personal and direct involvement of the defendant so as to preclude the imposition of vicarious liability?

3. Can a 42 U.S.C. §1985(3) claim be based on an alleged animus against religion?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The Cult Awareness Network respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Western District of Washington and the dissent thereto is reported at *Scott v. Ross,* 140 F.3d 1275 (9th Cir. 1998) and attached hereto as Appendix A.

The opinion of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc and the dissent thereto is reported at *Scott v. Ross,* 151 F.3d 1247 (9th Cir. 1998) and attached hereto as Appendix B.

The judgment on decision by the United States District Court for the Western District of Washington is unreported and attached hereto as Appendix C.

The Order denying Cult Awareness Network's motion for judgment as a matter of law, a new trial, or new trial conditioned on remitter by the United States District Court for the Western District of Washington is unreported and attached hereto as Appendix D.

BASIS FOR JURISDICTION

Petitioners seek a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Western District of Washington that was filed on April 8, 1998.

A timely petition for rehearing and suggestion for rehearing en banc was filed on April 23, 1998.

The Order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc was filed on August 26, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution First Amendment

42 U.S.C. §1985(3)

The text is set forth in Appendix E.

STATEMENT OF THE CASE

1. Introduction

Petitioner, the Cult Awareness Network ("CAN"), is a non-profit advocacy organization that seeks to educate the public about the harmful effects of mind control as used by destructive cults. CAN pursues this mission by offering information and counseling to persons concerned with destructive cults and by seeking to understand the tactics of mind control in order to provide protection from those persons who take advantage of people through mind control and coercive persuasion. CAN has been granted tax-exempt status under 26 U.S.C. §501(c)(3) by the Internal Revenue Service.

CAN's mission has proved controversial with those organizations that CAN believes utilize the types of mind control and coercive persuasion that CAN opposes. These include both religious and non-religious organizations. Some of these organizations have pursued steps to silence CAN's message.[1] Whether one agrees or disagrees with

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[1] One of the most vocal of CAN's opponents has been the Church of Scientology International ("CSI"). CSI has engaged in a campaign including filing lawsuits and taking other measures to harass CAN, silence CAN's criticisms of CSI, and ultimately to destroy CAN and silence its message. CSI's allegedly unlawful campaign is the subject of ongoing litigation between CAN and CSI. *See CAN v. CSI, et. al.*, 685 N.E.2d 1347 (Ill. 1997). The trial attorney for Jason Scott, Kendrick Moxon, regularly represents CSI and related scientology interests. The appellate attorney for Jason Scott, Eric Lieberman, also regularly represents CSI. Mr. Scott has filed an affidavit in the case indicating that Mr. Moxon solicited him as a client and did not apprise him of Mr.

CAN's message, that message is one which the members of CAN have First Amendment associational and speech rights to advocate. The judgment in the *Scott* case at issue, in the words of the Honorable Judge Kozinski joined by six other Circuit Judges dissenting from the order rejecting the suggestion for rehearing en banc, has "put the Cult Awareness Network out of business and silenced its message." *Scott v. Ross*, 151 F.3d 1247, 1248 (9th Cir. 1998).

The judgment against CAN stems from a jury finding that CAN was vicariously liable for the negligence of an alleged agent of CAN in connection with the illegal deprogramming of Respondent, Mr. Scott. The jury further found that CAN was also vicariously liable for acts of its alleged agent in conspiring with the other defendants with an anti-religious animus to deprive Mr. Scott of his right to travel in violation of 42 U.S.C. §1985(3). On the Section 1985 claim, the jury awarded punitive damages against CAN.

Moxon's plans with CSI to destroy CAN. Mr. Scott subsequently sold his judgment against CAN to Gerald Beeny for $25,000. Mr. Beeny has continued to use the services of Mr. Moxon and Mr. Lieberman. Mr. Beeny has also taken steps to try to execute the Scott judgment against two assets held by CAN: CAN's internal records and CAN's causes of action against CSI including the *CAN v. CSI* litigation. *See also*, Hansen, Did Scientology Strike Back?, The American Lawyer, June 1997 (cited by Judge Kozinski in his dissent to order rejecting suggestion for rehearing en banc).

2. Course of Proceedings

This case arises out of a mother's efforts to help her children who had become involved with a church that the mother felt was destructive and was alienating her children from her. The mother, Kathy Tonkin, contacted Shirley Landa through a referral from the Seattle Community Service, a multi-service hotline. Ms. Landa in turn referred Ms. Tonkin to defendant Rick Ross to perform a deprogramming of Ms. Tonkin's two youngest sons. Defendants Ross, Charles Simpson, and Mark Workman, conducted a legal and successful effort with respect to Ms. Tonkin's two youngest sons. Ms. Tonkin then retained Ross to deprogram her eldest son, Mr. Scott, who had turned 18. Ross, Simpson, and Workman conducted a deprogramming of Mr. Scott. Ms. Tonkin and one of Mr. Scott's brothers was present. Unfortunately, Mr. Scott's deprogramming was conducted illegally and included the abduction and involuntary restraint of Mr. Scott at a house in Ocean Shores, Washington for five days. Mr. Scott escaped and subsequently brought this lawsuit alleging negligence and a conspiracy to deprive him of his civil rights. CAN was named as a defendant on the basis that Ms. Landa was allegedly acting as an agent for CAN at the time she referred Ross to Ms. Tonkin. Ms. Landa was not named as a defendant.

Mr. Scott filed his Complaint on January 14, 1994. After a six day trial, the jury rendered a verdict finding defendants Ross, Simpson, Workman, and CAN liable for negligence in the following percentages: Ross, 70%, Workman 10%, Simpson 10%, and CAN 10%. The jury further found that each of the defendants, including CAN, had been involved in a conspiracy to deprive Mr. Scott of his civil rights. The jury found Mr. Scott's total amount of damages to be $875,000. Finally, the jury awarded punitive damages on the conspiracy claim against Ross in the amount of $2,500,000, against Workman in the amount of $250,000, against Simpson in the amount of $250,000, and against CAN in the amount of $1,000,000.

CAN timely filed an appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the lower court judgment 2 to 1. *Scott v. Ross*, 140 F.3d 1257 (9th Cir. 1998). The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation, dissented specifically emphasizing the complete lack of evidence establishing any knowledge or ratification by CAN of the underlying lawful acts alleged by Mr. Scott. The majority determined liability could be imposed upon CAN based only on evidence suggesting the alleged agent was following CAN's policy supporting involuntary, but lawful deprogramming.

CAN timely filed a motion for rehearing and suggestion for rehearing en banc. By order filed August 26, 1998, the Ninth Circuit panel denied the motion for rehearing. The suggestion for rehearing en banc was referred to the full court, but failed to gather the majority vote necessary for en banc consideration. *Scott v. Ross*, 151 F.3d 1247 (9th Cir. 1998). The Honorable Judge Kozinski, joined by Judges Pregerson, Reinhardt, Kleinfield, Hawkins, Tashima and McKeown, filed a dissent from the order rejecting the suggestion for rehearing en banc. The dissent principally focused on the failure of the panel to adequately consider the First Amendment implications of the imposition of vicarious liability and the conflict between the panel's decision and guiding Supreme Court precedent. Judge Kozinski wrote: "More importantly, the panel ignores the threat that vicarious tort liability poses to the freedom of CAN's members to associate with one another. In direct contravention of the Supreme Court's holding in *Claiborne Hardware*, the majority literally holds CAN guilty by association." 151 F.3d at 1248.

3. Statement of the Case

In an unprecedented and unsupportable finding, CAN, a controversial, advocacy, non-profit organization was held responsible for the act of one of its unpaid volunteers. The act -- a referral to a deprogrammer who performed an illegal

deprogramming -- was one of which CAN had no knowledge, which was contrary to CAN policy, and which was not undertaken even under the apparent authority or involvement of CAN.

CAN is "a national non-profit organization founded to educate the public about the harmful effects of mind control as used by destructive cults." CAN's paid staff consists of a full-time Executive Director and three part-time staff, all located at its Illinois headquarters.

CAN operates nationally through its Board of Directors ("Board") which sets policy for the organization. There is absolutely no evidence that any CAN board member had foreknowledge of any aspect of the planning or implementation of the deprogramming of Mr. Scott. Nor is there any evidence that the CAN Board in any way authorized or ratified the actions of Mr. Ross or any of the other defendants in Mr. Scott's abduction and deprogramming.

For a long time, CAN has had a specific Board policy against illegal deprogrammings. This unequivocal policy dates back well before the incidents at issue to the time of CAN's predecessor organization, the Citizens Freedom Foundation. In a publication entitled "The History of the Citizens Freedom Foundation," CAN's predecessor wrote: "We do not engage in or support abduction or holding a person against his will." In fact, CAN has

terminated employees for their involvement in illegal deprogrammings. On the other hand, CAN does support legal, voluntary deprogrammings. But in so doing, CAN has been very careful to make clear the distinction between legal and illegal acts. For example, in CAN at a Glance, CAN states: "CAN recognizes the need for **voluntary** exit counseling/deprogramming as a means to restore critical thinking, and supports all **legal** efforts to protect individuals' freedom of choice." (emphasis added). Accordingly, the type of deprogramming used with Mr. Scott was not authorized or in accordance in any way with CAN policy.

CAN's executive director, Cynthia Kisser, runs the CAN national office. There was no evidence that Ms. Kisser was in any way involved in the referral of Mr. Ross to Kathy Tonkin. There was no evidence that Ms. Kisser was consulted about the referral or Mr. Scott's deprogramming. There was no evidence that Ms. Kisser had any foreknowledge of the deprogramming of Mr. Scott. There was no evidence that Ms. Kisser ratified or approved after the fact the deprogramming of Mr. Scott.

CAN also operates through the use of "contact" persons. A "contact" is an unpaid part-time volunteer who is available in given areas to speak to members of the public on behalf of CAN. Contact persons generally have been chosen because of their commitment to CAN and CAN's

tenets. CAN contact persons are required to adhere to CAN policies -- including the policy against support of, or referral to, illegal deprogrammings. It would be irresponsible for a CAN contact person to make a referral to a person performing illegal deprogrammings. There was no evidence that CAN required its contact people to limit their activities to CAN or otherwise prohibited its contacts from being active in other, even like-minded, organizations. Mr. Scott's case against CAN relies entirely on the link between CAN and its contact person in Washington.

Shirley Landa is CAN's contact person in the state of Washington. However, CAN was but one of several organizations in which Ms. Landa was actively involved. In 1991, the year in which the events relevant to this case occurred, Ms. Landa was active in two organizations interested in cults in addition to CAN.

Prior to the referral of Mr. Ross, Ms. Landa had referred individuals to deprogrammers. Ms. Landa, however, had never received any report that any of these prior referrals had resulted in the illegal abduction of any person. There was no evidence that anyone at CAN had any different knowledge or understanding about prior referrals Ms. Landa had made. In other words, at the time of the events at issue, CAN believed that Ms. Landa acted wholly in accordance with CAN policy regarding referrals.

In 1991, Ms. Landa was volunteering for an organization called Parent Awareness. People who called the Seattle Community Services crisis hotline about family members involved in potentially extreme or destructive groups were referred to Parent Awareness. There was no evidence that Parent Awareness was related to CAN. There was no evidence that the Crisis Hotline referenced in any way Ms. Landa's association with CAN when referring people to her.

Mr. Scott's mother, Ms. Tonkin sought help in dealing with her sons. They were involved in the Life Tabernacle Church, which Ms. Tonkin believed was harmful. Ms. Tonkin also had been involved with the church and had recently left. She felt the church was controlling and alienating her sons from her.

Ms. Tonkin contacted the Seattle Community Service Hotline for help. The hotline referred Ms. Tonkin to Parent Awareness and gave her Ms. Landa's home telephone number. When Ms. Tonkin telephoned Ms. Landa she had never heard of CAN and did not believe she was contacting CAN. Ms. Landa did not answer the telephone in any way identifying that she was a contact person for CAN or that she was responding to Ms. Tonkin on behalf of CAN. In fact, Ms. Tonkin testified that never in any of her conversations with Ms. Landa did Ms. Landa suggest she had a current relationship with CAN. Ms. Landa then referred Ms. Tonkin to Rick

Ross. Ms. Tonkin subsequently hired Rick Ross and Ross illegally abducted Mr. Scott. CAN is nowhere to be found in this chain of referrals. CAN did not know about or authorize the referral to Ross. Nor did it know about, authorize, condone or ratify Scott's illegal deprogramming.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's refusal to recognize the First Amendment limitations on derivative liability established by this Court puts non-profit advocacy organizations at great risk. As Judge Kozinski aptly characterized the Ninth Circuit's decision: "It is a bitter object lesson in the dangers of ignoring the Supreme Court's pronouncement in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)." Whether expansive derivative liability can be imposed on a non-profit advocacy organization without some showing that the organization had knowledge of, authorized or ratified the illegal act of its alleged agent consistent with the First Amendment presents an important federal question. The Ninth Circuit's decision here decided that question in a way that conflicts with relevant decision of this Court.

Moreover, the Ninth Circuit's determination that vicarious liability can be imposed under 42 U.S.C. §1985(3) conflicts with decisions of the Seventh and Second Circuit Courts of Appeal, as well as numerous lower courts. This Court's

direction on the proper scope of liability under the federal civil rights act is needed to resolve the conflict.

This case also presents an appropriate opportunity to resolve another conflict between Circuit Courts on the scope of liability under 42 U.S.C. §1985(3). Specifically, the Fourth and the Fifth Circuits have reached exact opposite conclusions whether a religious based animus may form the basis for Section 1985 liability. *Compare World of Faith Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118 (5th Cir. 1996) and *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981). The Fourth Circuit's decision holding liability can rest on a religious based animus is particularly suspect in light of this Court's decision in *Bray v. Alexander Women's Health Center*, 506 U.S. 263 (1993).

1. The Court of Appeals' Refusal to Limit Application of Derivative Tort Liability in Light of the First Amendment Rights of a Non-profit Advocacy Organization Conflicts With Relevant Decisions of this Court.

The imposition of vicarious liability is particularly suspect when the alleged liable principal is an organization that engages in constitutionally protected associational and speech activity. In such a case, this Court has recognized that special critical attention needs to be applied in

reviewing the imposition of vicarious liability. This special scrutiny is vital to protect against abuses of vicarious liability claims to stifle the activity of organizations such as CAN that are active in controversial arenas. Liability can only be imposed upon a showing that there was authorization, knowledge, or ratification of the unlawful act upon which liability is based. The Ninth Circuit failed to consider these First Amendment implications in affirming the judgment below. Here, there is no evidence that CAN authorized or ratified the illegal abduction of Mr. Scott. Therefore, vicarious liability cannot be imposed upon CAN consistent with the First Amendment.

This Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 930-31 (1982) emphasized the constitutional protection that should have been afforded the activities of CAN in the case at bar. It noted:

> "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually their voices would be faint or lost." [*Citizens Against Rent Control for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981)]. In emphasizing "the

> importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *id.* at 205, we noted the words of Justice Harlan, writing for the Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

Claiborne Hardware, 458 U.S. at 908. Moreover, "[t]he right to associate does not lose constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Id.*

Associational rights of an advocacy organization are implicitly impacted by claims of derivative liability based on the acts of alleged agents/members. As explained by Judge Kozinski in his dissent: "The reach of strict vicarious liability is potentially endless, and crushing verdicts based on such attenuated claims can easily silence nonprofit organizations. " 151 F.3d at 1250. Because CAN's associational rights are implicated by the verdict in this case, the First Amendment

"imposes a *special obligation* on this Court to examine critically the basis on which liability was imposed." *Claiborne Hardware*, 458 U.S. at 915 (emphasis added).

With these firm constitutional principles guiding its decision, this Court found, in the highly analogous *Claiborne Hardware* case:

> The NAACP -- like any other organization -- of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified.
>
> The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. Aaron Henry, president of the NAACP and a member of the Board of Directors of the national organization, testified that the statements attributed to Evers were directly contrary to NAACP policy. . . . Similarly, there is no evidence that the

> NAACP ratified -- or even had specific knowledge of -- any of the acts of violence or threats of discipline associated with the boycott. Henry testified that the NAACP never authorized, and never considered taking and official action with respect to the boycott. The NAACP supplied no financial aid to the boycott. . . . The chancellor made no finding that the national organization was involved in any way in the boycott.
>
> **To impose liability without a finding that the NAACP authorized -- either actually or apparently -- or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment.**

Id. at 930-31 (emphasis added).

The Ninth Circuit distinguished *Claiborne Hardware* with the observation that "CAN is not being held liable for any of its speech or associations, but rather for its agent's involvement in Scott's deprogramming. In *Claiborne Hardware*, the evidence did not tie the NAACP to the purported illegal acts of its representatives; here, CAN has been directly linked to the acts of its agents." 140 F.3d at 1283. Judge Kozinski's discussion at p.

1249 of his dissent from the rejection of en banc consideration succinctly notes the error in the panel's reasoning. The reasoning is inconsistent with the record and fails to address the "big difference between advocating an activity when it is lawful and advocating the same activity when it is unlawful. Fallacious reasoning that conflates the two is especially dangerous in the First Amendment context." 151 F.3d at 1249.

The record in the instant case is bare with respect to any authorization or knowledge on the part of CAN condoning *illegal* deprogramming, including the attempted deprogramming of Mr. Scott. Both testimonial and documentary evidence unambiguously proved CAN's policy opposing illegal deprogramming for anyone, including Mr. Scott. Judge Beezer writing for the panel majority outlined the evidence against CAN but did not cite any evidence showing CAN supported *illegal* deprogramming. The evidence referenced by Judge Beezer regarding "involuntary, although not illegal, deprogramming" is an insufficient basis under *Claiborne Hardware* to impose vicarious liability. 140 F.3d at 1282.

Mr. Scott's case also relies on efforts to taint CAN by its limited prior association with Mr. Ross and other deprogrammers. "Recognizing that guilt by association is a philosophy alien to the traditions of a free society . . . and the First Amendment itself, we have held that civil or criminal disabilities may

not be imposed on one who joins an organization which has among its purposes the violent overthrow of the government, unless the individual joins knowing of the organization's illegal purposes and with the specific intention to further those purposes." *Claiborne Hardware*, 458 U.S. at 931. In the instant case, CAN should not fare worse. Yet, the Ninth Circuit "literally holds CAN guilty by association." Kozinski, J. (dissent), 151 F.3d at 1248.

CAN is an educational organization that engages in protected First Amendment activity in an area rife with controversy. As a result, CAN has been a target for several (unsuccessful) lawsuits. *E.g., Hart v. CAN*, 13 Cal.App.4th 777, 16 Cal. Rptr. 2d 705 (1993). This is precisely the type of situation addressed by the Supreme Court in *Claiborne Hardware*, which requires a heightened standard of judicial scrutiny and direct evidence linking the organization to involvement in the alleged illegal act. The Ninth Circuit failed to so extend CAN's First Amendment protection. As Judge Kozinski correctly concluded about the decision: "We have taken a great leap backwards in the protection of First Amendment freedoms." 151 F.3d at 1250.

2. The Ninth Circuit's Determination to Hold CAN Liable for Conspiracy on a Vicarious Liability Theory under 42 U.S.C. §1985 Conflicts With Decisions of Other Circuits.

The Ninth Circuit acknowledged it has not previously determined whether vicarious liability can be imposed under 42 U.S.C. § 1985(3).[2] 140 F.3d at 1284. In analyzing the issue, the Ninth Circuit dismissively ignored other precedent as non-binding authority. *Id.* The Court concluded vicarious liability could be imposed on CAN. *Id.*

This holding creates conflicts with well established doctrines of other jurisdictions. Numerous federal courts have held flatly that vicarious liability may not be imposed under § 1985(3). *See Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1272 (7th Cir. 1984); *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *Westinghouse Broadcasting Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1974); *Howard v. Topeka-Shawnee County Metropolitan Planning Commission*, 578 F. Supp. 534, 538 (D. Kan. 1983); *Carnegie v. Miller*, 811 F. Supp. 907,

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[2] In general terms, 42 U.S.C. §1985(3) renders unlawful conspiracies to deprive persons of equal protection of the law or of equal privileges and immunities under the law. 42 U.S.C. §1985(3). Under this statute, a plaintiff must show some racial or other class-based discriminatory animus that underlies the conspirators' conduct. *See United Bhd. of Carpenter & Joiners v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckenridge*, 403 U.S. 88 (1971)

914 (S.D.N.Y. 1993); *Hankins v. City of Philadelphia*, 1998 U.S. Dist. LEXIS 5101, at * 38 (E.D. Pa. April 9, 1998). Even district courts within the Ninth Circuit have adhered to the rule against the imposition of vicarious liability in § 1985(3) cases. *See Luke v. Abbott*, 954 F. Supp. 202, 203 n.1 (C.D. Cal. 1997); *cf. Vasquez v. City of Reno*, 461 F. Supp. 1098, 1102 (D. Nev. 1978); *cf. Meza v. Lee*, 669 F. Supp. 325, 326 (D. Nev. 1987).

These courts have rejected the applicability of the doctrine of respondeat superior to 42 U.S.C. §1985(3) cases on two related grounds. First, a number of circuit and district courts have applied this Court's holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a case decided under 42 U.S.C. §1983, a related statute, to conspiracy claims brought under 42 U.S.C. §1985(3). *See e.g., Bell*, 746 F.2d at 1272; *Owens*, 601 F.2d at 1247; *Brown v. Washington*, 661 F. Supp. 1011, 1012 (N.D.Ill. 1987); *Carnegie*, 811 F. Supp. at 914; *Luke*, 954 F. Supp. at 203, n.1.

In *Monell*, this Court held that a municipality is subject to damages liability under 42 U.S.C. §1983 for the unconstitutional acts of its employees. The Court further held, however, that such liability cannot result merely from a theory of respondeat superior. *Id.* at 691-94. In rejecting the doctrine of vicarious liability, the Court did not relieve municipal entities from all liability for deprivations of citizens' constitutional rights. Rather, it clarified

that such liability may be imposed only for acts taken by the entity which fairly tie it to the unlawful deprivation. According to the Court: liability can be imposed only if the acts at issue were performed pursuant to "a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. *See also Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (reaffirming that a municipality's policy must be "the moving force of the constitutional violation"). Thus, under *Monell* and its progeny, direct liability must be established. *Brown*, 661 F. Supp. at 1012 (citing *Bell*, 746 F.2d at 1269 and *Owens*, 601 F.2d at 1242).

Other jurisdictions have rejected the application of vicarious liability to 42 U.S.C. §1985(3) claims on similar grounds, requiring a direct link between the conduct of the principal and the plaintiff. *See, e.g., Adams*, 445 F.2d at 107 (requiring a showing of "overt acts on the part of the [principal]"); *Howard*, 578 F. Supp. at 538-39 (the alleged conspirator "must be shown to have been directly involved in a deprivation of plaintiff's civil rights") (citing *Lessman v. McCormick*, 591 F.2d 605, 612 (10th Cir. 1979)).

The Ninth Circuit decision contends that adoption of a rule against vicarious liability under 42 U.S.C. §1985(3) would be tantamount to adopting a rule that organizations or entities can escape liability. These concerns, however, readily

dissipate under a careful analysis of the pertinent authorities, including the Ninth Circuit cases relied upon by the Majority.

Under the standards articulated above, organizations and entities are not immune from liability under 42 U.S.C. §1985(3). Courts have recognized that both public and private entities can be held liable under 42 U.S.C. §1985(3) in an appropriate case where facts demonstrate that the entity has taken overt steps or has carried out an official policy or practice which has resulted in the deprivation of an individual's civil rights. *Cf. Owens*, 601 F.2d at 1247 (finding that plaintiff may be able to plead allegations sufficient to state a cause of action against a governmental entity); *Hankins*, 1998 U.S. Dist. LEXIS at * 38 (suit against union failed to plead that any union officer possessed requisite racial animus to enter into a conspiracy); *Callahan v. Commonwealth Land Title Insurance Co.*, 1990 U.S. Dist. LEXIS 14524 (failure demonstrate racial or other class-based animus by several companies that underwrite or sell title insurance).

As described, *supra*, there was no evidence of any overt acts by CAN or any policy or practice of CAN knowingly referring persons to deprogrammers who engaged in *illegal* deprogrammings such as the one to which Mr. Scott was

subjected.[3] Under the standards precluding vicarious liability for entities or organizations under 42 U.S.C. §1985(3) cited above, there was no legal basis upon which to hold CAN liable for conspiracy.

3. Finding CAN Liable Under 42 U.S.C. §1985(3) Based on an Alleged Animus Towards Religion Conflicts with the Decision of Another Circuit

CAN was found liable under 42 U.S.C. §1985(3) based on a "discriminatory animus towards [Mr. Scott's] religious affiliation." Order of the United States District Court Denying Motion for New Trial, Appendix D, p. 5. In addition to the decision in this case, the Fourth Circuit has ruled that a religious animus can form the basis for a Section 1985 (3) claim. *Ward v. Conner*, 657 F.2d 45 (4th Cir. 1981). See also the cases cited therein, 657 F.2d at 48. In contrast, the Fifth Circuit, in a decision filed after the trial in this case, squarely declined "to extend the reach of Section 1985(3) to include conspiracies motivated by religious, as opposed, to racial animus." *World of Faith Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118, 124 (5th Cir. 1996). This Court to date has not allowed any class-based animus, other than racial animus, to form the basis for a claim under 42 U.S.C. §1985(3). This case presents the

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[3] CAN policy to refer persons for *lawful* involuntary deprogrammings is an insufficient basis to impose vicarious liability.

opportunity to resolve, strictly as a matter of law, this conflict between Circuits.

In *Griffin v. Breckenridge*, 403 U.S. U.S. 88 (1971), this court recognized that 42 U.S.C. §1985(3) did reach private conspiracies based on a racial discriminatory animus. This Court further held out in dicta that "perhaps" there may be other class-based animus that would also form the basis for a Section 1985 (3) claim. *Id.* at 102. This Court has not resolved the "perhaps" in any definitive way and certainly not with respect to religion as a class. Frankly, the courts in *Ward* and in *World of Faith* reached their respective opposite conclusions without much analysis. The important question whether religious class-based animus can form the basis for a Section 1985(3) claim needs guidance from this Court.

This case also presents the opportunity for the Court to further delineate the application of *Bray v. Alexandria Woman's Health Clinic*, 506 U.S. 263 (1993) which involved the assertion of a Section 1985(3) claim against a controversial advocacy organization. In *Bray*, this Court refused to extend Section 1985 liability against demonstrators at an abortion clinic. First, this Court noted that "[w]hatever may be the precise meaning of 'class' for purposes of *Griffin's* speculative extension of Section 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage

in conduct that the Section 1985(3) defendant disfavors." 506 U.S. at 269. This Court concluded that "'Woman seeking abortion'" is not a qualifying class." *Id.* The claimed animus in this case -- "towards [Mr. Scott's] religious affiliation" -- seems equally flawed.

Next in *Bray*, this Court considered the contention whether a desire to stop voluntary abortions could be deemed a class-based animus against all women sufficient to support a Section 1985 claim. This Court refused to find that an animus to abortion translated into an animus against women. Significantly, this Court noted that there were rational bases for opposing abortion that were not based on hatred of women. 506 U.S. at 760. Similarly, in this case, CAN's alleged animus against organizations that destructively use mind control techniques does not translate into a general animus against religion. The claim suffers from flaws in that there are non-religious grounds for opposing the destructive use of mind control techniques and that CAN's opposition extends only to a very limited group of religious organizations, not generally to all religious organizations. Moreover, CAN's concerns extend to non-religious organizations as well as religious organizations.

Finally, in *Bray*, this Court concluded that for a claim to be stated under Section 1985(3), the alleged animus must be of a type of "harsh" discrimination akin to racism. 506 U.S. at 274.

Opinions that are reasonably susceptible to disagreement or conflicting value judgments do not qualify as invidious discriminatory animus. *Id.* Here, whether one agrees or disagrees with CAN's mission to educate about harmful mind control and cults, the issues CAN raises are certainly susceptible to reasonable differing opinions and value judgments. Simply because Respondent's counsel would argue the opposite, just as abortion supporters claim that invidious sexism is behind opposition to abortion, does not alter this conclusion. One of the lessons of *Bray* is that Section 1985(3) should not be used as a tool to resolve the disputes between ideologically or philosophically opposed organizations. The decision in the *Scott* case, however, goes far to undermine that lesson and should be reversed.

CAN acknowledges that the Ninth Circuit did not pass upon the question whether a religious based animus can support a Section 1985(3) claim. Exceptional circumstances exist, however, to justify this Court addressing the issue here. First, the question is "a pure issue of law, appropriate for . . . immediate resolution." *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982). Moreover, the question is in a "state of evolving definition" and "one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991). The interests of justice certainly would be best served by granting review of this important question.

4. The Questions Presented Are Important

The questions presented for review raise important issues broadly affecting the potential exposure of non-profit organizations throughout the United States. Non-profit organizations play a vital societal role advocating different and sometimes controversial points of views. Such discourse is, of course, at the core of the First Amendment as is the right of persons to associate through non-profits to enhance their message. Non-profits primarily operate through the work of unpaid part-time volunteers. To subject a controversial advocacy organization to traditional notions of vicarious liability because of the act of one of its volunteers creates serious threats to the First Amendment values advanced through the operations of such organizations. As this Court stated in *Claiborne Hardware*: "The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit." 458 U.S. at 932.

Such threats are real. As Judge Kozinski stated: "Is 'destruction by lawsuit' a judicial fantasy, a chimera? Indeed not. This is the very case that put CAN out of business. . . . CAN effectively died as a direct result of this judgment, and the mission its supporters set out to accomplish died with it." 151 F.3d at 1250. A decision that silences the message of an advocacy organization has serious nationwide consequences.

Where First Amendment values are implicated, therefore, the courts must impose some limit on application of traditional tort vicarious liability. Specifically, liability should only be imposed where the organization bears some direct responsibility for the illegal act at issue by way of authorization or ratification. In other words, only an organization's advocacy of illegal acts should be punished. Where an organization advocates legal, although controversial, activity and is linked to tortious activity only through the unauthorized and unratified acts of its volunteer 'agent", liability cannot be imposed consistent with First Amendment values. Otherwise, organizations across the political spectrum will face the same threat as CAN and find their message, like CAN's, silenced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: _____

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON SCOTT,
Plaintiff-Appellee,
v.
RICK ROSS, aka RICKEY ALLEN ROSS; MARK WORKMAN; CHARLES SIMPSON,
Defendants,
and
CULT AWARENESS NETWORK, a California Non-Profit Corp.,
Defendant-Appellant

No. 96-35050

D.C. No.
CV-94-00079-JCC

OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
September 11, 1997 – Seattle, Washington

Filed April 8, 1998

Before: Mary M. Schroeder and Robert R. Beezer,
Circuit Judges, and William W Schwarzer,*
Senior District Judge.

Opinion by Judge Beezer; Dissent by Judge Schwarzer

*The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

OPINION

BEEZER, Circuit Judge:

Defendant-appellant Cult Awareness Network ("CAN") appeals the jury's verdict finding CAN liable for conspiracy and negligence. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

In 1991, Kathy Tonkin and her six children joined the Life Tabernacle Church ("Life Tabernacle"), a branch of the United Pentecostal Church International. Tonkin remained a member for over a year before withdrawing. She urged her sons to withdraw from Life Tabernacle, but her three oldest sons, appellant Jason Scott ("Scott"), Thysen and Matthew, refused. At the time Scott was 18 years of age, Thysen, 16 and Matthew, 13.

Tonkin believed Life Tabernacle had a destructive effect on her sons and sought help in having them removed from the church's influence. Tonkin contacted Shirley Landa after a referral from the Seattle Community Service hotl

ine. Landa was involved in various "anti-cult" activities and worked as CAN's Washington state "contact." A "contact" is "an unpaid volunteer who is available in given areas to speak to members of the public on behalf of CAN." CAN has described itself as "a national nonprofit organization founded to educate the public about the harmful effects of mind control as used by destructive cults." CAN operates nationally through volunteer contacts and affiliates. CAN has only four paid staff members, a full-time Executive Director and three part-time staff.

Landa referred Tonkin to Rick Ross, whom Tokin hired to "deprogram" her three sons. Although the record is somewhat unclear as to the specific nature or origin of Landa's

relationship with Ross, it is clear that Landa was aware Ross performed involuntary deprogrammings because she had seen Ross do so on the television prog

ram "48 Hours." Ross was known to, and received referrals from, other CAN members as well.

Ross performed "successful" involuntary deprogrammings on Thysen and Matthew, who were minors and therefore within their mother's control. Tonkin, Landa and Ross knew that to deprogram Scott would be more difficult legally be

cause Scott was 18 years of age. Nonetheless, Ross, with the aid of defendants Simpson, Workman and Rotfroff, attempted to deprogram Scott. They abducted Scott and held him captive for five days, during which Ross "debated" Life Tabernacle's teachings with Scott. Tonkin planned to send Scott to a deprogramming center in Ohio after Ross completed the deprogramming. After several days, Scott feigned acceptance of Ross' positions, escaped and filed this suit.

Scott claimed Ross, Simpson, Workman, Rotfroff and CAN conspired to deprive him of his civil rights in violation of 42 U.S.C. § 1985(3). Scott also brought state law tort claims for negligence and outrage. Scott's claim against CAN was based upon CAN's vicarious liability for the acts of its alleged agent, Landa.

Rotfroff settled with Scott before trial. After a six-day trial, a jury found the remaining defendants liable for civil rights violations and negligence and awarded Scott $875,000 in compensatory damages and $4 million in punitive damages. The jury allocated 10% of the negligence liability and $1 million in punitive damages against CAN. CAN appeals.

CAN raises a variety of arguments on appeal. CAN principally focuses on the issue of Landa's agency: (i) CAN con-

tends that the district court's jury instructions failed to follow Washington's agency law, and (ii) CAN argues that the evidence was insufficient to impose liability because the evidence demonstrated neither that Landa acted as CAN's agent nor that Landa acted within the scope of any alleged authority. CAN claims that the imposition of liability based upon Landa's acts violates CAN's First Amendment rights. CAN contends that liability may not be imposed on it pursuant to 42 U.S.C. § 1985(3). CAN challenges the admission of the testimony of Scott's expert, Dr. Anson Shupe. We reject each of CAN's arguments.

II

CAN argues that the district court's agency instruction did not accurately describe Washington state agency law. We review a district court's formulation of civil jury instructions for an abuse of discretion. *See Fikes v. Cleghorn*, 47 F.3d 1011, 1013 (9th Cir. 1995).

[1] In Washington, a principal is liable for the negligent acts of its agent when the agent acts on behalf of the principal and within the scope of employment. *See Roletto v. Department Stores Garage Co.*, 191 P.2d 875, 877 (Wash. 1948) (a principal's liability rests on a showing "that the relation of master and servant exists between the person at fault and the one sought to be charged for the result of a wrong; and the relation must exist at the time, and in respect to the particular transaction out of which the injury arises."). If the agent is not acting on the principal's behalf at the time of the act in question, then the principal is not liable for that act. *Id.* This rule applies to agents who are volunteers. *See Abel v. Firs Bible and Missionary Conference*, 360 P.2d 356, 358 (Wash. 1961).

[2] The district court's agency jury instructions properly described these principles. CAN's argument that the jury instructions did not allow the jury to conclude that Landa

might be an agent of CAN for some purposes, but not for the purposes of Scott's deprogramming, is not persuasive. The district court's instructions, read as a whole, properly address CAN's concern. The district court instructed:

> The defendant Cult Awareness Network is sued as a principal. The plaintiff claims that Shirley Landa was acting as the Cult Awareness Network's agent in making the referral of Rick Ross to Kathy Tonkin. CAN denies that Shirley Landa was acting as CAN's agent and that Ms. Landa was at the time she made the referral acting within the scope of her authority.
>
> If you find that Shirley Landa was the agent of CAN and was acting within the scope of authority, then any act or omission within of Ms. Landa was the act or omission of CAN. If you find Ms. Landa was not acting within the scope of authority as CAN's agent, then you must find for CAN.[1]

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[1] The district court's entire agency instruction reads:

> Under the law, a corporation is a person. The defendant Cult Awareness Network is a corporation. it can only act through its employees, agents, directors or officers; therefore, a corporation is responsible for the acts of its employees, agents, directors and officers performed within the scope of their authority.
>
> An agent is a person who performs services for another person under an express agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal.
>
> One may be an agent without receiving compensation for services. The agency agreement may be oral or written. An agent is acting within the scope of authority if the agent is engaged in the performance

The district court's reference to CAN's theory, coupled with the ensuing instruction requiring a showing that Landa "was acting within the scope of her authority," accurately states Washington agency law. These instructions differ only slightly from CAN's proposed instruction which reads: "[CAN] can be liable to Scott only if Shirley Landa was acting as its agent when she provided Scott's mother with the name and telephone number of Rick Ross."[2] The district court properly instructed the jury.

> of duties which were expressly or impliedly assigned to the agency by the principal. Any act or omission of an agent within the scope of authority is the act or omission of the principal.
>
> The defendant Cult Awareness is sued as a principal The plaintiff claims that Shirley Landa was acting as the Cult Awareness Network's agent in making the referral of Rick Ross to Kathy Tonkin. CAN denies that Shirley Landa was acting as CAN's agent and that Ms. Landa was at the time she made the referral acting within the scope of her authority.
>
> If you find that Shirley Landa was the agent of CAN and was acting within the scope of authority, then any act or omission of Ms. Landa was the act or omission of CAN. If you find Ms. Landa was not acting within the scope of authority as CAN's agent, then you must find for CAN.

[2] CAN proposed the following jury instruction:

> In order to hold the Cult Awareness Network liable for Scott's alleged injuries, you must find that Shirley Landa was acting as the Cult Awareness Network's agent at the time, and with respect to the particular transaction out of which Scott claims his injury arises. In other words, Cult Awareness Network can be liable to Scott only if Shirley Landa was acting as its agent when she provided Scott's mother with the name and telephone number of Rick Ross.

III

CAN argues that the evidence was insufficient to impose liability on CAN because the evidence failed to demonstrate that Landa acted as CAN's agent and that she acted within the scope of her authority. We review de novo a district court's denial of a motion for judgment as a matter of law. *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 354 (9th Cir. 1996). Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *Acosta v. City & County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir.), *cert. denied*, 117 S. Ct. 514 (1996). We review a district court's denial of a motion for a new trial for an abuse of discretion. *Wharf v. Burlington Northern R.R. Co.*, 60 F.3d 631, 637 (9th Cir. 1995).

[3] CAN may be held liable for Landa's acts if those acts were on CAN's behalf and within the scope of Landa's agency. *E.g., Roletto v. Department Stores Garage Co.*, 191 P.2d 875 (Wash. 1948); *Thompson v. Everett Clinic*, 860 P.2d 1054, 1056 (Wash. Ct. App. 1993) ("In order to hold an employer vicariously liable for the tortious acts of its employees, it must be established that the employee was acting in furtherance of the employer's business and that he or she was acting within the course and scope of employment when the tortious act was committed."), *review denied*, 877 F.2d 694 (Wash. 1994). In addition, "[a]gency requires that both parties consent to the relationship and that the principal exercise control over the agent." *Nordstrom Credit, Inc. v. Department of Revenue*, 845 P.2d 1331, 1335 (Wash. 1993). Agency may be proven with circumstantial evidence. *Griffiths v. Big Bear Stores, Inc.*, 347 P.2d 532, 535 (Wash. 1959) (citing *Smith v. Leber*, 209 P.2d 297, 301 (Wash. 1949)). Our review of the record discloses evidence that supports the jury's finding of agency and that meets the district court's instruction.

The evidence demonstrates that Landa, who referred Tonkin to Ross, and who was aware of the plan to deprogram Scott, was a CAN contact person. Landa testified that she was designated as a CAN contact person for Washington state and had been on CAN's list of contact persons for years. Landa, who belonged to several other cult-related organizations, had a long-standing relationship with CAN. She was a founder of the Citizens Freedom Foundation ("CFF"), the predecessor organization to CAN, and a former member of CAN's board. Although Landa testified that she received fewer than five referrals per year from CAN, it appears she did, in fact, receive CAN referrals concerning "cult" matters in Washington.

The evidence indicates that CAN functioned through its contact people. William Rehling, CAN's president, stated that "[c]ontact people are people who are available to be contacted to encourage communication . . . so that if . . . someone needed to speak with a representative of CAN, they can deal with the contact person." When asked if contact people were "representatives" of CAN, Rehling replied that CAN's contacts were "people who are available to talk to people who have the need or desire to discuss CAN with or cults with someone" and who "facilitate communication." When asked how contact people encountered members of the public, Rehling explained that, "[a] contact person is someone that could be . . . given to that person initially as just someone to speak with, or its possible that it would work the other way, that somebody, the CAN office, might suggest they speak to a contact person. Both of those are possible." Rehling stated that CAN authorized its contact people to represent to the public that the contact people were assisting on behalf of CAN.

The evidence shows CAN controlled the appointments of its contact people and had the right to terminate them. Rehling testified that CAN chose its contact people by

considering their commitment to CAN, their willingness to serve as contact people, their history of good relations with CAN, and their perceived agreement with CAN's tenets. Rehling though that CAN might have issued policies concerning how contact people should conduct themselves with the public and that the contact people might have to sign agreements with CAN. Rehling acknowledged that CAN could remove from its list of contact persons any contact person who engaged in misconduct.

The evidence indicates that it was CAN's practice to refer people to deprogrammers, including Rick Ross, and that Ross was known to engage in involuntary deprogramming. Tonkin said Landa described Ross as "a very successful deprogrammer" with a "very, very high success rate." Martin Butz, a CAN employee who answered CAN's national hotline, estimated he referred a "few hundred" people to "exit counselors," *i.e.*, deprogrammers who did not engage in forcible interventions. Butz acknowledged that he referred people to Rick Ross. Although Butz claimed he was unaware of Ross engaging in *illegal*, involuntary deprogramming, Butz admitted he was "aware" of the "48 Hours" television program. concerning Ross. That program reported that Ross restrained a fourteen-year-old boy and conducted an involuntary, although not illegal, deprogramming. Butz said that after the broadcast of the "48 Hours" program, people requested Ross' name and telephone number from him. Although Butz said he had not referred anyone to Ross in the past two and a half to three and a half years, Butz admitted providing the requested information on perhaps six occasions.

Although Ross did not specifically recall receiving any referrals from Butz, Ross acknowledged that he "may have received referrals for information from the Cult Awareness Network." He also remembered "receiving some calls and people said that they – they may have said that they had talked to CAN or some other organization." When asked if

CAN's referrals to him led to "exit counseling" or deprogramming, Ross acknowledged that the referrals "for information" "may have resulted" in his being "retained . . . for some purpose," such as voluntary "exit counseling."[3]

Other evidence was admitted that concerned Ross' contact with CAN and CAN's awareness of Ross. For example, Ross had applied to be the executive director of CFF. Ross acknowledged he corresponded with Priscilla Coates, CFF's executive director. In a letter to Coates, Ross indicated that he wanted to complete two more exit counseling cases that year in order to support one of his projects, and wrote "a couple of cases right now would be great. Do you know of anything?" In the letter, Ross stated that Cynthia Kisser, CAN's executive director, had given him a "couple of referrals." Ross included in his promotional materials testimonials from CAN directors. Coates stated at a testimonial that she had "referred many families, friends, siblings and inquiries of all kinds to Rick." Ross attended CAN conferences in Los Angeles, Oklahoma City, Chicago and Dallas.

[4] In summary, there is sufficient evidence, if believed by the jury, to establish that Landa was a CAN contact person; that CAN functioned through its contact people, that CAN members routinely referred people to deprogrammers, including Ross; that Ross conducted involuntary deprogrammings; and that CAN was aware of Ross and the fact he conducted involuntary deprogrammings. The evidence was sufficient to support the jury's verdict on the question of Landa's agency with respect to her referral of Tonkin to Ross.

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[3] Ross even stated that he "may have been considered a contact person for CAN in [his] capacity at Jewish Family and Children Service during the early '80s," although he was not sure who considered as such.

IV

[5] CAN argues it should not be held liable for Scott's injuries because, even if Landa acted as CAN's agent, Landa's referral of Tonkin to Ross was an act beyond Landa's authority as a CAN agent. However, as discussed *supra*, the evidence establishes that CAN members routinely referred callers to deprogrammers, including involuntary depro-grammers; thus, Landa's referral of Tonkin to Ross did not violate CAN's actual practices. CAN's "official" policy prohibiting involuntary deprogramming neither undermines the evidence concerning CAN's practices nor precludes imposition of vicarious liability. *E.g.*, *Smith v. Leber*, 209 P.2d 297, 303 (Wash. 1949) (respondents cite no case holding that an express prohibition against the doing of a certain act absolves an employer from liability, where such an act was done in conjunction with other acts which were within the scope of the duties an employee has been instructed to perform.) Because Landa acted within the scope of her authority, there is no reason to set aside the jury's verdict.

V

CAN argues for the first time on appeal that the imposition of vicarious liability for Landa's acts violates CAN's First Amendment speech and associational rights. Generally, we do not consider issues raised for the first time on appeal. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). Nonetheless, we have discretion to review issues not raised below when, as here, "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Id.*

CAN relies primarily on *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Claiborne* involved a

boycott against certain white businesses in Mississippi by African-American residents. After discussing the protestors' speech and associational rights, the Supreme Court stated that the NAACP representative was not liable for his speech because it "did not exceed the bounds of protected speech." *Id.* at 929. Because the NAACP's spokesman was not liable, the NAACP, as his principal, could not be held liable. Although the NAACP and its members had well-recognized associational rights, the NAACP, "like any other organization," would be held liable for any actionable conduct of its agents "undertaken within the scope of their actual or apparent authority." *Id.* at 930.

[6] *Claiborne* is distinguishable from the instant case. CAN is not being held liable for any of its speech or associations, but rather for its agent's involvement in Scott's deprogramming. In *Claiborne*, the evidence did not tie the NAACP to the purportedly illegal acts of its representative; here, CAN has been directly linked to the acts of its agent, Landa.

VI

CAN argues that: (i) it cannot be held vicariously liable for conspiracy under § 1985(3), and (ii) even if it could be held liable, the evidence presented fails to establish that CAN engaged in any conspiracy to violate Scott's rights.

A. Vicarious Liability

CAN argues that vicarious liability cannot be imposed under § 1985(3).[4] Although CAN raises this issue for the first time on appeal, we may review purely legal issues raised for the first time on appeal if the record was fully

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[4] It appears that CAN could have challenged – perhaps successfully – the § 1985(3) judgment against it on other grounds. However, CAN has waived any such arguments by failing to raise them on appeal.

developed at trial. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). We review de novo questions of law. *United States v. Gutierrez*, 116 F.3d 412, 415 (9th Cir. 1997).

Neither CAN nor Scott cites to binding authority concerning the imposition of vicarious liability under § 1985(3). Instead, both parties rely on cases concerning 42 U.S.C. § 1983. Can argues that liability does not arise under § 1985 on theories of respondeat superior or vicarious liability. Scott contends that CAN's liability is premised on CAN's policy and practices condoning involuntary programming; in effect, Scott attempts to graft § 1983 principles concerning municipal liability onto § 1985(3). We have yet to adopt either view in this circuit.

[7] The parties have not offered persuasive reasons why we should adopt their arguments. We are reluctant to adopt wholesale § 1983 principles with respect to § 1985(3) in light of the fact that, unlike § 1985(3) was intended to reach "private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment." *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 833 (1983). With a few exceptions, claims brought pursuant to § 1985(3) do not require state action. *See id.* at 830 (the exception is that a conspiracy to infringe first Amendment rights does not violate § 1985(3) unless there is state involvement or the conspiracy's aim is to influence state activity). The same cannot be said with respect to § 1983. The policy and practice limitation on municipal liability under § 1983 shields governmental agencies from liability for unauthorized actions of its officers to a greater extent than traditional respondeat superior principles do; given this, to replace traditional principals of vicarious liability with a "policy and practice" theory of liability with respect to private actors strikes us as suspect.

[8] To adopt CAN's argument that there is no vicarious liability under § 1985(3) would be tantamount to adopting a

rule that private organizations or entities can never be liable under § 1985(3). That is not the law of this circuit. In *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979), we reversed the dismissal of plaintiff's complaint where plaintiff was a female disability insurance policyholder who sued the California State Insurance Commissioner and several insurers. In *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439 (9th Cir. 1994), we reversed the dismissal of plaintiff's complaint where plaintiff was a black physician who sued a hospital and members of the hospital's supervisory committee. Although we did not explicitly address the issue of vicarious liability in these cases, it is apparent that in absence of some type of vicarious liability, the entity defendants could not have been liable.

[9] We conclude that vicarious liability may be imposed on CAN in this action. Under either traditional principles of respondeat superior or "policy and practice" principles, CAN would be liable. Landa acted as CAN's agent, and Landa acted in accordance with CAN's practice of referring people to involuntary deprogrammers.

B. Sufficiency of the Evidence

CAN argues that even it if is liable under § 1985(3) for Landa's acts, the evidence fails to establish that Landa was aware of any plan to deprogram or abduct Scott, and that even if she was aware of this plan, she did not participate in it. The record shows otherwise.

[10] A plaintiff alleging a conspiracy under § 1985(3) must establish: the existence of a conspiracy to deprive the plaintiff of the equal protection of the laws; an act in furtherance of the conspiracy; and a resulting injury. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992) (citing *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 828-29 (1983)). "A conspiracy can be inferred from conduct and need not be proven by evidence of an express

agreement." *Ward v. Equal Employment Opportunity Comm'n*, 719 F.2d 311, 314 (9th Cir. 1983).

[11] The record shows Landa was involved in the agreement to deprogram Scott and thereby violate his civil rights. Landa referred Tonkin to Ross, and Landa was aware of Ross' methods. Tonkin indicated that Landa referred to Ross as "a very successful deprogrammer" with a "very, very high success rate." Landa knew Ross conducted involuntary deprogramming, as indicated by the fact she saw the "48 Hours" program in which Ross involuntarily deprogrammed a minor. Landa was involved in the deprogramming of Scott's younger brothers. Tonkin discussed and planned the deprogramming of Scott with Landa. Landa advised Tonkin of the possible legal problems involved in Scott's deprogramming. Landa told Tonkin that the only way properly to deprogram Scott was to abduct and deprogram him. The fact Ross contacted Landa for "legal advice" after his arrest is further evidence of her complicity. *See United States v. Calabrese*, 825 F.2d 1342, 1348 (9th Cir. 1987) (knowledge of and participation in conspiracy can be inferred from circumstantial evidence and from defendant's actions) (citation omitted).

CAN's reliance on Landa's testimony to establish that she was not involved in the alleged conspiracy is not persuasive. In denying CAN's motion for judgment as a matter of law or for a new trial, the district court noted that the jury was justified in discounting Landa's testimony given "the numerous illustrations of Landa'[s] bias and hostility, as well as the inconsistencies on her testimony.

VII

CAN argues that the admission of the testimony of Dr. Shupe, whom Scott proffered as an expert in the "anti-cult movement," violated Rules 702 and 703 of the Federal Rules of Evidence. In general, we review the admission of expert

testimony for an abuse of discretion. *United States v. Alonso*, 48 F.3d 1536, 1539 (9th Cir. 1995).

CAN moved in limine to exclude Dr. Shupe's testimony, but CAN did not object to his testimony at trial. We have "reject[ed] an invariable requirement that an objection that is the subject of an unsuccessful motion in limine be renewed at trial." *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986). Instead, "where the substance of the objection has been thoroughly explored during the hearing on the motion in limine, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence." *Id.*; *see also United States v. Lui*, 941 F.2d 844, 846 (9th Cir. 1991).

[12] The issue of the admissibility of Dr. Shupe's testimony was not properly preserved for review because the district court's ruling lacked the necessary definitiveness. When Scott sought to qualify Shupe as an expert at trial, the district court stated that, "in my view of the rules, Counsel, it is up to the jury to determine the expertise if there is no objection to [Dr. Shupe's] testimony." In other words, although Scott was not precluded from calling Dr. Shupe as an expert, the district court would consider objections to specific testimony elicited. Despite this warning to CAN's counsel, CAN failed to object to Dr. Shupe's testimony on rule 702 or 703 grounds. Later, the district court expressed surprise at CAN's failure to object during Dr. Shupe's testimony and noted its willingness to consider objections to Dr. Shupe's testimony. Even then, at the district court's prompting, CAN failed to object or to move to strike Dr. Shupe's testimony. Rather, CAN's attorney admitted that after the denial of CAN's motion in limine, CAN made a "strategic decision" to "deal with it." In these circumstances, we review the admission of evidence for plain error. *Cf. United States v. Alonso*, 48 F.3d 1536, 1539 (9th Cir. 1995). The fact that the district court might have sustained

objections, had they been made, does not mean that the district court wrongly admitted Dr. Shupe's testimony.

[13] Turning to the merits of CAN's argument, CAN contends that Dr. Shupe's testimony was inadmissible under Rule 702 of the Federal Rules of Evidence. Rule 702 allows for the admission of expert testimony that will aid the trier of fact in understanding the evidence or determining a fact in issue.[5] There are four factors to consider in determining if expert testimony will assist the trier of fact: (i) whether the expert is qualified; (ii) whether the subject matter of the testimony is proper for the jury's consideration; (iii) whether the testimony conforms to a generally accepted explanatory theory; and (iv) whether the probative value of the testimony outweighs its prejudicial effect. *United States v. Castaneda*, 94 F.3d 592, 595 (9th Cir. 1996) (citing *United States v. Rahm*, 993 F.2d 1405, 1409 (9th Cir. 1993)).

[14] The district court properly admitted Dr. Shupe's testimony. Shupe is qualified; he is a professor of sociology who has studied and written about the "anti-cult movement" for the last 19 years. *See Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994) (Rule 702 "contemplates a broad conception of expert qualifications."). CAN's argument that Shupe did not specifically study CAN or its practices does not undermine Shupe's credibility. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997) (fact that expert's opinions were based on data collected by others was immaterial to determining whether opinions were admissible).

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[5] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist a trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[15] Shupe's testimony was proper for the jury because he testified regarding matters beyond the general knowledge of jurors. That is, Shupe discussed the history and general practice of deprogramming and the origin and practices of the "anti-cult movement." That CAN denies either endorsing or performing violent deprogrammings does not make Dr. Shupe's testimony excludable. This matter was taken up on cross-examination, and the merits of Dr. Shupe's opinion was properly challenged by showing his inability to point to specific CAN literature endorsing violent deprogrammings. Shupe's opinion as to the entrepreneurial nature of deprogramming and its origins in religious intolerance was not inappropriately admitted. Just as CAN questioned the credibility of Dr. Shupe, so too the jury was free to disregard his testimony.

[16] Dr. Shupe's testimony conformed to a generally accepted explanatory theory, as indicated by his citation to other authors, primarily collaborators, who have discussed theories consistent with his. Because Dr. Shupe provided the jury with useful information about the anti-cult movement and was available for cross-examination, defeating in large part any concerns of prejudice, the probative value of his testimony outweighed any prejudicial effect.

[17] CAN argues that the admission of Dr. Shupe's testimony violated Rule 703 of the Federal Rules of Evidence. Rule 703 allows an expert witness to form an opinion based on facts or data either before or at the hearing. The facts or data relied upon need not be otherwise admissible if they are "of a type reasonable relied upon by experts in a particular field." Fed. R. Evid. 703.[6] CAN

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[6] Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before

argues that Dr. Shupe's opinions were based on newspaper articles, certain pretrial testimony and conversations with colleagues, all of which, CAN contends, fail to constitute evidence "reasonably relied" on by experts in Dr. Shupe's discipline. CAN argues that Shupe's testimony lacks any indicia of trustworthiness to merit consideration of hearsay materials. However, Shupe's citations to his extensive studies and to his collaboration with other academics as the basis for his opinions suffice to merit admission of his testimony.

The judgment of the district court is AFFIRMED.

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the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

SCHWARZER, Senior District Judge, dissenting:

I respectfully dissent.

The evidence presented at trial was insufficient to support the jury's finding that CAN was liable for the consequences of Landa's negligent referral. Under Washington law, to impose liability on a principal for the acts of its agents, a plaintiff must establish not only the existence of an agency relationship but also that "the relation . . . exist[ed] at the time, and in respect to the particular transaction of which the injury arises." *Hamm v. Camerota*, 290 P.2d 713, 715 (Wash. 1955); *Roletto v. Department Stores Garage Co.*, 191 P.2d 875, 877 (Wash. 1948).[1] There was ample evidence for the jury to find that Landa, as a CAN-appointed contact person, was CAN's agent. However, there was no evidence from which the jury could find that Landa acted as CAN's agent "in respect to the particular transaction out of which the injury arises." The relevant evidence showed the following:

Landa belonged to several cult-related organizations in addition to CAN. She was listed on the Seattle crisis hotline as "Parents Awareness." Tonkin called Community Services and then reached Landa on her private line. Tonkin had never heard of CAN when she called Landa and did not learn about CAN until later. She testified she thought Landa was involved with Community Services, not CAN. Scott presented no evidence, direct or circumstantial, that Landa was acting on directions or instructions of CAN, or that CAN knew of Landa's referral of Tonkin (or, for that matter, of

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[1] The majority relies upon this interpretation of Washington state law in upholding the jury instructions, *see* Op. at 3212; however, it ignores this interpretation in finding the evidence sufficient to uphold the liability verdict.

other similar referrals by her) to Ross, much less that CAN gave its approval.

The majority concludes that the jury could find Landa was CAN's agent with respect to her referral of Tonkin because Landa was a contact person, CAN functioned through contact persons who referred people to deprogrammers including Ross, Ross conducted involuntary deprogrammings, and CAN was aware that Ross conducted involuntary deprogramming. That reasoning, however, requires a leap of logic. It might be supportable if Tonkin had called CAN and been referred to Landa who then referred her to Ross. However, that did not occur. On this record, Landa's connection with CAN was irrelevant to her dealings with Tonkin and Ross.

A hypothetical might help make the point. Suppose X is a delivery driver for the ABC bread company and also for the DEF bread company. He drives the identical route for each but alternates serving the two companies, on one day he delivers for ABC and the next for DEF. On a day on which he delivers for ABC, he hits a pedestrian. Surely DEF could not be held liable (along with ABC) although X is its agent and performs the identical service for DEF as for ABC. The same is true in this case: CAN cannot be held liable although Landa was its agent. There is no evidence that in referring Tonkin to Ross, Landa was acting as CAN's agent.

Accordingly, I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON SCOTT, Plaintiff-Appellee, v. RICK ROSS, aka RICKEY ALLEN ROSS; MARK WORKMAN; CHARLES SIMPSON, Defendants, and CULT AWARENESS NETWORK, a California Non-Profit Corp., Defendant-Appellant	No. 96-35050 D.C. No. CV-94-00079-JCC ORDER

Filed August 26, 1998

Before: Mary M. Schroeder and Robert R. Beezer, Circuit Judges, and William W Schwarzer,* Senior District Judge.

Order; Concurrence by Judge Schroeder; Dissent by Judge Kozinski

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ORDER

The majority of the panel has voted to deny the petition for rehearing. Judge Schwarzer votes to grant the petition. Judge Schroeder votes to reject the suggestion for rehearing en banc and Judge Beezer so recommends.

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*The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration.

Pursuant to rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Appellee's motion to vacate this courts October 27, 1997 Order staying execution of judgment is granted.

SCHROEDER, J., concurring:

I agree fully with Judge Beezer's opinion and write separately only to emphasize a key fact in this case. In Judge Schwarzer's dissent, his bread-delivery hypothetical suggests that Landa might have made the referral to Ross on behalf of an anti-cult organization other than CAN. There was, however, no evidence that Landa ever made referrals on behalf of other organizations. Rather, the evidence was sufficient to enable the jury to find that Landa was acting on behalf of CAN and no other organization when she referred Tonkin to Ross.

KOZINSKI, Circuit Judge, with whom **PREGERSON, REINHARDT, KLEINFELD, HAWKINS, TASHIMA** and **McKEOWN**, Circuit Judges, join, dissenting from the order rejecting the suggestion for rehearing en banc:

This is the case that put the Cult Awareness Network out of business and silenced its message. It is a bitter object les-

son in the dangers of ignoring the Supreme Court's pronouncement in *NAACP v Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Plaintiff's mother, Kathy Tonkin, sought help in extricating three of her sons from the Life Tabernacle Church. Her eldest son Jason Scott, an adult, was brought into involuntary contact with Rick Ross through the following chain of events: (1) Tonkin contacted (2) the Seattle Community Service hotline, which referred her to (3) Parent Awareness, a local anti-cult organization. Parent Awareness was staffed by (4) Shirley Landa, who holds herself out as an expert in deprogramming children involved in cults. Landa then referred Tonkin to (5) Rick Ross. Tokin hired Ross, and Ross illegally abducted the plaintiff, held him captive and unsuccessfully tried to convince him to leave the church. Ross, CAN and others were held liable for conspiracy to violate Scott's civil rights; CAN was socked for $87,500 in compensatory and $1 million in punitive damages.

CAN is nowhere to be found in the chain of referrals, yet the panel majority upholds the million dollar award. CAN, a nonprofit organization with just four paid employees, maintained a list of contacts throughout the country who volunteered to speak out against cult membership and mind control. Landa was one of CAN's volunteer contacts. CAN didn't know about or authorize the referral to Ross. Nor did it know about, authorize, condone or ratify Scott's deprogramming. Tonkin never sought CAN's assistance to help deprogram her sons. CAN had no control over the referral or what happened afterwards.

The panel majority nevertheless upholds the award on the theory that Landa was acting as CAN's agent. This is a dubious premise to begin with: Landa wasn't paid by CAN, and she worked with many other anti-cult organizations, all of which could be held jointly liable under the panel's logic.

See Scott v. Ross, 140 F.3d 1275, 1287 (9th Cir. 1998) (Schwarzer, J., dissenting). More importantly, the panel ignores the threat that vicarious tort liability poses to the freedom of CAN's members to associate with one another. In direct contravention of the Supreme Court's holding in *Claiborne Hardware*, the majority literally holds CAN guilty by association.

Claiborne Hardware involved a sometimes-violent black community boycott of white-owned businesses in Mississippi. The boycotters were held liable under Mississippi law for the loss of business and goodwill caused by the boycott. Claiborne Hardware secured a judgment in state court holding the NAACP vicariously liable for the acts of Charles Evers, a Field Secretary for the NAACP and an organizer of the boycott. In determining whether Evers' relationship with the NAACP justified the imposition of derivative liability, the Supreme Court considered whether "Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence," *Claiborne Hardware*, 458 U.S. at 930; whether the NAACP ratified or had specific knowledge of any violence, *see id.* at 930-31; and whether the NAACP supplied financial assistance to the boycott, *see id.* at 931. Finding that the NAACP had in no way authorized or ratified the violence, the Court held that "[t]o impose liability . . . would impermissibly burden the rights of political association that are protected by the First Amendment." *Id.*[1]

Shirley Landa's relationship with Can was far less direct than Charles Evers' link to the NAACP. Evers was a paid Field Secretary for the NAACP; Landa was an unpaid

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[1] The Court made it plain that this holding was wholly independent of its separate holding that Evers' leadership and organization of the boycott, even when combined with his emotionally charged rhetoric, did not justify imposing liability on him for violent acts that occurred weeks or months after one of his speeches.

volunteer for CAN and many other organizations. Evers helped found the local branch of the NAACP and was widely known as an NAACP representative; Tokin was referred to Landa by the Seattle Community Service hotline and had never heard of CAN when she requested Landa's help. In *Claiborne Hardware*, the Court exonerated the NAACP even though "the NAACP . . . posted bond and provided legal representation for arrested boycott violators." *Id.* at 931 n.78. In this case, CAN never ratified Landa's referral in any way. By any measure, this is an *a fortiori* case to *Claiborne Hardware*.

The majority distinguishes *Claiborne Hardware* in a single sentence: "In *Claiborne*, the evidence did not tie the NAACP to the purportedly illegal acts of its representative; here, CAN has been directly linked to the acts of its agent, Landa." *Scott*, 140 F.3d at 1283. And what is this link? The panel explains that "CAN members routinely referred callers to deprogrammers, including involuntary deprogrammers." *Id.* But involuntary deprogramming is not illegal; involuntary deprogramming of minors with the consent of their parents is perfectly legal. Thus, it would have been entirely appropriate for CAN to refer the distraught parents of a minor to someone who will subject the child to involuntary (though nonviolent) deprogramming.[2] Nothing in the opinion – nothing in the record – provides any support for the view that CAN approved or authorized *illegal* deprogramming. Indeed, CAN had an official policy *against* illegal deprogrammings. The majority dismisses this policy as inconsistent with CAN's actual practices, but it is simply mistaken: CAN supported involuntary deprogramming of minors, but not involuntary deprogramming of adults. The opinion cites no contrary evidence because there is none.

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[2] Indeed, the opinion recognizes that involuntary deprogramming is not always illegal when it notes that a CAN employee saw a television program that reported that "Ross restrained a fourteen-year old boy and conducted an involuntary, although not illegal, deprogramming." *Id.* at 1282.

There is a big difference between advocating an activity when it is lawful and advocating the same activity when it is unlawful. Fallacious reasoning that conflates the two is especially dangerous in the First Amendment context. Take the proverbial parade down Main Street: Many organizations encourage their members to stage such events in order to bring their message to the public. Does this mean that they advocate holding demonstrations during rush hour without a permit? Under the majority's theory, the organization could be held liable for injuries caused by an illegal demonstration held by one of its affiliates, even though the parent never authorized or advocated an illegal demonstration. All lawful conduct can be conducted in an illegal fashion; ignoring this crucial distinction does away with the protection afforded organizations under *Claiborne Hardware*.

Just as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), protects freedom of speech by narrowly circumscribing the reach of state libel law, *Claiborne Hardware* limits derivative liability to protect freedom of association. As the Supreme Court has noted: "[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 284-86) (citing, inter alia, *Claiborne Hardware*, 458 U.S. at 933-34). The evidence cited by the majority here clearly does not provide the support required by the First Amendment.

The reach of strict vicarious liability is potentially endless, and crushing verdicts based on such attenuated claims can easily silence nonprofit organizations. As the Court explained in *Claiborne Hardware*: "To equate the liability of the national organization with that of the Branch

in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it. The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit." *Claiborne Hardware*, 458 U.S. at 931-32 (quoting *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting from dismissal of writ of certiorari)) (internal quotation marks omitted).

Is "destruction of lawsuit" a judicial fantasy, a chimera? Indeed not. This is the very case that put CAN out of business. *See In re Cult Awareness Network, Inc.*, 205 B.R. 575, 576 & n.1 (Bankr. N.D. Ill. 1997) (noting that this case "precipitated CAN's voluntary petition for relief" in bankruptcy court); Susan Hansen, *Did Scientology Strike Back?*, The American Lawyer, June 1997, at 62, 67 (describing how CAN was forced to cease operations when it couldn't afford the bond for a stay pending this appeal). CAN effectively died as a direct result of this judgment, and the mission its supporters set out to accomplish died with it.[3] This result is troubling regardless of where one falls on the political spectrum. Should ACT UP be litigated out of existence if one of its protestors punches a photographer? Should Planned Parenthood be shut down because a pro-choice doctor performs an abortion on a minor without obtaining parental consent where required by state law? Should the NRA be put out of business because one of its field representatives provided a firearm to a minor, contrary to the organization's policy? *Claiborne Hardware* already answers these questions in the negative, for much the same

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[3] Strictly speaking, there is an organization that operates under the Cult Awareness Network logo, having bought the logo and 800 number of the original CAN in a bankruptcy court sale of assets. *See* http://www.cultawarenessnetwork.org. It is an organization with a very different message than the original CAN. Some may believe this is a better message. But the message of the original CAN, and those who supported it, has been silenced.

reasons that the New York Times can't be held liable if an advertisement ruffles some feathers,[4] a delegate can't be convicted for attending a meeting of the Communist Labor Party,[5] a KKK leader can't be arrested for organizing a protest[6] and Nazis can goose-step in Skokie.[7] We have taken a great leap backwards in the protection of First Amendment freedoms. I dissent.

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[4] *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

[5] *See Whitney v. California*, 274 U.S. 357 (1927).

[6] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[7] *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

UNITES STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JASON SCOTT,	)	
	)	
Plaintiff,	)	CASE NO. C94-79C
	)	
v.	)	JUDGMENT ON
	)	DECISION BY THE
RICK ROSS, et al.,	)	COURT
	)	
Defendants.	)	
	)	

This action came on for trial before the Court and a jury, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a verdict having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiff is awarded compensatory damages in the sum of $875,000. Punitive damages are awarded against defendant Rick Ross in the sum of $2,500,000, defendants Mark Workman and Charles Simpson in the sum of $250,000 each and against defendant Cult Awareness Network in the sum of $1,000,000.

DATED this 3rd day of October, 1995.

John C. Coughenour
United States District Judge

UNITES STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JASON SCOTT,	)	
	)	
Plaintiff,	)	CASE NO. C94-0079C
	)	
v.	)	ORDER
	)	
RICK ROSS, et al.,	)	
	)	
Defendants.	)	
	)	

This matter comes before the Court on the following motions: (1) defendant Cult Awareness Network's (hereinafter "CAN") motion for judgment as a matter of law, a new trial, or a new trial conditioned on a remittitur; (2) CAN's and defendant Rick Ross' motions to stay execution of judgment; (3) defendant Rick Ross' motion for a new trial or amendment of judgment; and (4) plaintiff Jason Scott's motion for an award of attorney's fees.

I. PROCEDURAL BACKGROUND

In January 1994, Mr. Scott filed this action requesting a jury trial on a variety of claims against CAN, Mr. Ross, Mr. Mark Workman, Mr. Charles Simpson and Mr. Clark Rotroff.[1] Each of the claims stemmed from the abduction and involuntary religious deprogramming of Mr. Scott. Prior to trial, the Court narrowed the claims to conspiracy to violate Mr. Scott's civil rights under 42 U.S.C. § 1985(3) (hereinafter "§ 1985(3)"), the tort of outrage, and negligence.

[1] Prior to trial, plaintiff entered into a settlement agreement with Mr. Rotroff for an undisclosed sum.

At the close of trial, the jury returned a verdict against each of the defendants on virtually all the remaining claims.[2] The jury awarded compensatory damages in the amount of $875,000.00. Pursuant to the civil rights claim, the jury awarded punitive damages in the amount of $1,000,000.00 against CAN, $2,500,000.00 against Mr. Ross, and $250,000.00 each against Mr. Simpson and Mr. Workman.

Mr. Ross and CAN now challenge the jury's findings and move the court for an order staying execution of the judgment.

II. STANDARD OF REVIEW: JUDGMENT AS A MATTER OF LAW AND NEW TRIAL

On a motion for judgment under Fed. R. Civ. P. 50, the court must determine "whether the evidence, considered as a whole and viewed in the light most favorable to the nonmoving party, reasonably can support *only* a verdict for the moving party." Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992) (emphasis in original). If substantial evidence supports a verdict for the non-moving party, judgment as a matter of law is inappropriate. Id. "Substantial evidence" requires a showing of "such evidence as a reasonable mind might accept as adequate to support a conclusion." Los Angeles Land Co. v. Brunswick Corp., 6 F.3rd 1422, 1425 (9th Cir. 1993).

Under Fed. R. Civ. P. 59, a new trial may be granted "if the verdict is contrary to the clear weight of the evidence, or ... to prevent, in the sound discretion of the trial judge, a miscarriage of justice." Murphy v. Long Beach, 914 F.2d 183, 187 (9th Cir. 1990) (citations omitted). In making this

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[2] In the only exception, the jury found that CAN's actions did not constitute the tort of outrage.

determination, the Court may simply weigh the evidence and need not view it from the perspective most favorable to the non-moving party. Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 190 (9th Cir. 1989).

III. CAN'S TRIAL MOTIONS

CAN asserts that the evidence produced at trial does not support the jury's findings that CAN acted negligently or conspired against Mr. Scott under § 1985(3). CAN also challenges the award of punitive damages and the amount assessed against it. The Court shall consider each claim separately.

A. NEGLIGENCE

CAN claims the evidence on negligence did not support a finding that Ms. Shirley Landa acted as CAN's agent with respect to the events in question. See Nordstrom Credit, Inc. v. Department of Revenue, 120 Wash.2d 935, 940, 845 P.2d 1331 (1993) (agency must be established with respect to the particular transaction out of which the injury arises). CAN asserts that the most the evidence shows is that Ms. Landa generally acted as a contact person and volunteer for CAN on other occasions.

The Court concludes that the evidence supports the jury's finding on the negligence claim against CAN. CAN's attempt to distance itself from Ms. Landa's actions and Mr. Scott's deprogramming through the use of phrases such as "contact person" and "volunteer" belies the great weight of the evidence. For example, there was an abundant showing that Ms. Landa was an active member of CAN, the contact person for CAN in Washington during the time of the events in question, and under CAN's control and supervision during

this time.[3] Further, evidence also showed that Ms. Landa acted in accordance with CAN practices by distributing information on cults and referring Mr. Scott's mother, Ms. Kathy Tonkin, to Mr. Ross for deprogramming. This combination of factors, along with the rest of the evidence contained in the record, makes judgment as a matter of law or a new trial on the negligence claim unwarranted.

B. CONSPIRACY TO VIOLATE CIVIL RIGHTS

CAN asserts that the evidence at trial was also insufficient to support a finding that CAN took part in A conspiracy to deprive Mr. Scott of his civil rights under § 1985(3). As a basis for this argument, CAN reasserts that the evidence does not support a finding that Ms. Landa acted as CAN's agent. CAN also claims that the record does not show that Ms. Landa, or anyone else at CAN, knowingly participated in the plan to abduct Mr. Scott, deprogram him, and deprive him of the right to interstate travel.

Again, the Court concludes that the evidence sufficiently supports the jury's determination that CAN knowingly participate in the decision to abduct Mr. Scott and deprive him of the right to interstate travel. Moreover, the evidence conclusively established that the decision was motivated by a discriminatory animus towards his religious affiliation.[4] For example, the evidence showed that Ms. Landa referred Ms. Tonkin to Mr. Ross, met with the deprogramming "team" during their initial trip to Washington, and met with her sister and Ms. Tonkin to

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[3] The Court notes that the main support for the CAN's argument that Ms. Landa was acting for another organization comes from Ms. Landa herself. Given the numerous illustrations of Ms. Landa' bias and hostility, as well as the inconsistencies in her testimony, the Court finds that the jury was entitled to disregard this testimony.

[4] The Court has already rejected CAN's contention regarding Ms. Landa's agency status.

discuss any legal recourse for removing Mr. Scott from his church.[5] There was also substantial testimony that the conspiracy included a clear goal to hold Mr. Scott against his will, prevent him from pursuing a mission outside the country, and transport him to across state lines to a retreat for ex-members of religious groups.

Accordingly, judgment as a matter of law or a new trial on the civil rights claim against CAN would be inappropriate.

C. PUNITIVE DAMAGES

On the award of punitive damages, CAN asserts that: (1) it cannot be held liable for punitive damages stemming from Ms. Landa's conduct; (2) the record does not support a finding of the type of motive necessary for punitive damages; and (3) the amount of the award was unreasonable. CAN also argues that the award was prompted out of the passion of an inflamed jury.

In order to sustain a finding of punitive damages against a principal for the acts of its agent, it must be found that the agent acted in a managerial capacity or that the principal authorized or ratified the acts of the agent. Mitchell v. Keith, 752 F.2d 385, 389-91 (9th Cir. 1985). This authorization or ratification must be made with knowledge that the agent acted out of ill-will, spite, for the purpose of injuring, or with complete indifference to the plaintiff's safety and rights. Id., Jury Instruction No. 29.

If punitive damages were appropriately assessed, the amount must still comport with standards of due process. In determining whether an award violates due process, the

[5] The Court also notes that further evidence in the record linked CAN to the conspiracy in a number of ways unrelated to Ms. Landa's actions alone.

Ninth Circuit has endorsed a three stage process. Morgan v., Woessner, 997 F.2d 1244, 1256 (9th Cir. 1993). First, the Court must determine whether the jury was adequately instructed. Id. Second, the Court must review the award for excessiveness. Id. The third stage is appellate review. Id.

CAN does not object to the adequacy of the jury instructions on punitive damages. Rather, CAN asserts that the award is excessive. In reviewing for excess, the Court must look to factors bearing on reasonableness. Id. at 1257. These reasonableness factors include, but are not limited to: (1) whether there is a reasonable relationship between the harm caused and the award; (2) the degree of reprehensibility of the conduct as well as the conduct's duration and frequency; (3) the profitability to the defendant; (4) the financial position of the defendant; (5) all costs of litigation; (6) the imposition of criminal sanctions against the defendant; and (7) the existence of other civil awards versus the defendant for the conduct. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 1045 (1991).

The court finds that there is sufficient evidence to support the jury's finding that Ms. Landa's actions were authorized or ratified by CAN. Again, by way of example, CAN admitted to its control and supervision of its contact persons. CAN officials stated that these persons could be removed for violation of policy. However, Ms. Landa was not removed for violation of policy and remains a CAN contact person.

As noted above, testimony also established that Ms. Landa, acting in accordance with CAN's practices, disseminated inflammatory information on cults and referred Ms. Tonkin to a known "involuntary deprogrammer." As the evidence demonstrated, it was within the knowledge of CAN and Ms. Landa that these practices would lead to Mr. Scott's abduction in this case. Thus, the Court finds that the evidence also supports the jury's determination that CAN's

ratification of Ms. Landa's acts was done with knowledge of their malicious nature as well as the deliberate disregard to Mr. Scott's rights.

Finally, the court concludes that the amount of punitive damages awarded against CAN was reasonable, within the boundaries of due process, and not improperly prompted by passion. CAN's argument against the award relies most heavily on the fact that it is a non-profit corporation and was forced into bankruptcy by this judgment. However, these financial factors are not necessarily determinative and are heavily outweighed by other factors in this case.

Initially, the Court notes that the reprehensibility of CAN's conduct goes far to justify the amount of the award. The continued use of euphemisms such as "involuntarily deprogramming" does not alleviate the fact that the actions in furtherance of the conspiracy involved the forceful abduction and retention of an adult against his will. Nor do the references to the goal of "educating" the public answer the virtually undisputed evidence that materials on "cults" will be negative and highly inflammatory by definition. the evidence showed that without regard to this fact, and despite an admitted lack of personal knowledge of Mr. Scott's church or his ability as an adult to rationally choose his own religion, Ms. Landa sent these "cult" materials to Ms. Tonkin.

Other factors tend to show the reasonableness of the award as well. For instance, the evidence illustrated that the defendants' actions caused Mr. Scott to suffer physically. More importantly, the evidence firmly supports a finding that the entire deprogramming episode shook his emotional stability and rendered his family life non-existent. Finally, it is undisputed that CAN does not face criminal charges or further civil liability for its actions. Thus, having carefully considered these and the rest of the relevant factors, the

Court concludes that the amount of the punitive damages assessed against CAN was reasonable and appropriately supported by the evidence.

IV. MR. ROSS' MOTION FOR A NEW TRIAL

Mr. Ross claims that a new trial is warranted due to error in the jury instructions, failure to exclude Mr. Scott's counselor's testimony, and lack of evidence supporting damages. If the court is unwilling to grant a new trial on the merits, Mr. Ross argues that a new trial should be held on the damages issue alone. Again, the Court shall discuss the specific issues separately.

A. JURY INSTRUCTIONS

Mr. Ross claims that a new trial is warranted due to error in the Court's instructions to the jury. He asserts that the instructions should have included language that the § 1985(3) claim required an element of "invidiously discriminatory class-based animus." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971). He also claims that the instructions improperly allowed the jury to consider whether the defendants' actions violated Mr. Scott's First Amendment right of freedom of religion. United Brotherhood of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 830, 103 S.Ct. 3352, 3357 (1983).

Mr. Ross' reliance on the language in Breckenridge is misplaced. Although class-based discriminatory animus is undoubtedly required, the Supreme Court has not given the term "invidiously discriminatory class-based animus" the type of talismanic effect suggested by Mr. Ross. In the present case, the Court finds that Jury Instruction 21 contained the proper § 1985(3) discriminatory standard based upon Mr. Scott's religious affiliation. Specifically, the instruction stated that "there must be some intentional purpose to discriminate against plaintiff's religion as the

basis for the conspirator's action. The conspiracy, in other words, must have been aimed at depriving plaintiff because of his religion, members of plaintiff's religion, or other similar religions equal enjoyment of the rights secured by law to all persons." Jury Instruction 21; Cf. Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (stating that the classes protected under § 1985 include those who have been singled out by the Court's as "suspect" or "quasi-suspect").

Similarly, the Court finds that Mr. Ross' objection that the instructions improperly allowed the jury to consider Mr. Scott's freedom of religion does not justify a new trial. As stated above, Jury Instruction 21 identified the type of discriminatory animus required under the law. Indeed, such instruction was necessary to ensure that the jury did not consider whether the conspiracy was aimed at Mr. Scott personally or simply at depriving him of the right to interstate travel. This instruction was immediately followed with instructions stating Mr. Scott's assertion on the right to interstate travel, clearly designating this assertion as an element of the conspiracy claim, and stating that Mr. Scott needed to prove all elements of the § 1985(3) claim by a preponderance of the evidence.[6]

The court also concludes that the decision to instruct the jury on the claims of negligence against the individuals does not warrant a new trial. The need for instructions on the individual negligence claims was clear to the parties prior to trial. The Court had previously held that the complaint sufficiently stated a claim of negligence against the individual defendants. As such, the Court finds that instructing the jury and allowing Mr. Scott's counsel to

[6] With regard to the amount of proof on these elements, the court again notes that there was ample evidence supporting the finding that Mr. Ross acted with the purpose to deprive Mr. Scott of the right to interstate travel due to discriminatory feelings towards his religious affiliation.

submit supplemental instructions did not unfairly surprise or prejudice any of the defendants. In this regard, it is worth noting that Mr. Ross did not object to the content of the negligence instructions on individuals.

B. EXCLUSION OF WITNESSES

The Court finds that the decision to allow the testimony of Mr. Scott's counselor does not warrant a new trial. The Court determined that Mr. Ross was sufficiently aware of the intent to call a counselor and received adequate discovery in this regard. Moreover, the testimony only added additional support to the evidence concerning the amount of damages Mr. Scott incurred. Given the amount of evidence produced against Mr. Ross on the substantive claims and the amount of damages, a new trial would be inappropriate.

C. COMPENSATORY AND PUNITIVE DAMAGES

Mr. Ross objects to the amount of both the compensatory and punitive damages awarded. Mr. Ross claims that the evidence was insufficient to support the amount of compensatory damages, the amount of punitive damages was unreasonable, and the jury's award was motivated out of passion.

Considering the extensive testimony on the destruction of Mr. Scott's family life as well as his physical and emotional problems after the deprogramming, the Court finds that evidence does not justify a new trial or a reduction of compensatory damages. Again, numerous witnesses verified the extent of these injuries. However, the parties agree that the compensatory damages should be offset by the amount of the settlement with Mr. Rotroff. See Husky Refining Co. v. Barnes, 119 F.2d 715, 716 (9th Cir. 1941); RCW 4.22 et seq. Accordingly, the Court orders Mr. Scott's counsel to submit documentation of this settlement amount.

As to punitive damages, Mr. Ross also argues that the award was excessive. Specifically, Mr. Ross asserts that the damages bear no relation to the harm suffered or to the amount necessary to deter his future conduct. The Court disagrees.

The Court concludes not only that there is a sufficient relationship between the harm and Mr. Ross' conduct, but that the remaining reasonableness factors also weigh heavily towards upholding the jury's punitive damages award. As noted above, the evidence supported the large award of compensatory damages. Moreover, Mr. Ross' use of terminology cannot avoid the uncontradicted evidence that he actively participated in the plan to abduct Mr. Scott, restrain him with handcuffs and duct tape, and hold him involuntarily while demeaning his religious beliefs.[7]

A large award of punitive damages is also necessary under the recidivism and mitigation aspects of the factors cited in Haslip. Specifically, the Court notes that Mr. Ross himself testified that he had acted similarly in the past and would continue to conduct "deprogrammings" in the future. Further, Mr. Ross faces no future criminal or civil liability for his conduct.

Finally, the Court notes each of the defendants' seeming incapability of appreciating the maliciousness of their conduct towards Mr. Scott. Rather, throughout the entire course of this litigation they have attempted to portray themselves as victims of Mr. Scott's counsel's alleged agenda. Thus, the large award given by the jury against both CAN and Mr. Ross seems reasonably necessary to enforce the jury's determination on the oppressiveness of the

[7] With regard to Mr. Ross' role in this affair, the Court notes that there is no credible support for the contention that he was merely another participant in a plan wholly developed and controlled by Ms. Tonkin.

defendants' actions and deter similar conduct in the future. Accordingly, the Court finds that both the compensatory and punitive damages awards were reasonable and well founded in the evidence.

V. MOTION TO STAY JUDGMENT

Both CAN and Mr. Ross moved the Court for an order staying the exercise of the judgment in this matter until after the decision on the Rule 50 and Rule 59 motions. These motions are moot.

VI. MOTION FOR ATTORNEY'S FEES

Mr. Scott requests attorney's fees in the amount of $225,915.00. This request is made pursuant to 42 U.S.C. § 1988 which provides that a Court may award attorney's fees to a prevailing party in a § 1985 claim. 42 U.S.C. § 1988(b).

In response to the request for fees, defendants CAN and Mr. Ross notified the Court that they have declared bankruptcy since the entry of judgment. As such, they correctly contend that any decision on the award of attorney's fees against them is automatically stayed under bankruptcy law. 11 U.S.C. § 362(a). In order to ensure the ability to make adequate factual findings on the fees and prevent potential prejudice arising from any award against defendants Mr. Workman and Mr. Simpson, this Court shall stay consideration of the attorney's fees issue until the discontinuation of or relief from the automatic stay in CAN's and Mr. Ross' bankruptcy proceedings.

VII. CONCLUSION

In summation, the Court hereby ORDERS as follows:

1) CAN's Motion for a Judgment as a Matter of Law or a New Trial is DENIED;

2) Mr. Ross' Motion for a New Trial or for Reduction in Damages in DENIED in part, and GRANTED in part. Attorneys for Mr. Scott are ORDERED to submit verification of the amount of the settlement with Mr. Clark Rotroff. The award of compensatory damages shall be offset in the amount of this settlement;

3) CAN's and Mr. Ross' Motion for Stay of Judgment is MOOT;

4) Mr. Scott's Motion for Attorney's Fees is STAYED from consideration in this Court pending the discontinuation of or relief from the automatic stay in the CAN and Rick Ross bankruptcy proceedings.

SO ORDERED this 29 day of November, 1995.

_____

The Honorable John C. Coughenour
United States District Judge

UNITED STATES CONSTITUTION
FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. 1985(3)

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

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No. 98-878

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

CULT AWARENESS NETWORK,
Petitioner,

VS.

JASON SCOTT,
Respondent.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF AMERICAN FAMILY FOUNDATION ("AFF"), HALT, INC. – AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM ("HALT"), JEWS FOR JUDAISM, WATCHMAN FELLOWSHIP IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

American Family Foundation ("AFF"), HALT, Inc. — An Organization of Americans for Legal Reform ("HALT"), Jews for Judaism and Watchman Fellowship ("*amici*") hereby respectfully move for leave to file the attached brief as *amici curiae*. The attorney for the petitioner has given consent. Consent of the attorney for respondent was requested but refused.

Amici's perspectives illuminate the importance of this case in which they all have an interest as non-profit organizations engaged in advocacy and dependent on volunteers. As Judge Kozinski's dissent to the denial of rehearing *en banc* explained, the Court of Appeals' unprecedented expansion of derivative liability erodes precedents of this Court, notably *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and takes "a great leap backwards in the protection of First Amendment freedoms." *Scott v. Ross*, 151 F.3d 1247, 1250. Erosion of *Claiborne Hardware* exposes *amici* and other non-profits to burdensome threats and litigation, including efforts to silence their advocacy messages and chill dissemination of controversial views.

As Mothers Against Drunk Driving ("MADD") stated in an *amicus* letter to the Ninth Circuit endorsing these *amici*'s legal arguments:

> MADD's programs [of public awareness, education, legislation and aggressive enforcement] are furthered by the efforts of tens of thousands of unpaid volunteers at the local level. These persons are not officers, employees or directors of MADD, but rather volunteers committed to MADD's mission. MADD's national office does not exercise control over the activities of the individual volunteers. To hold MADD liable under a

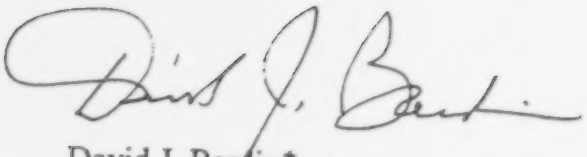
respondeat superior or vicarious liability theory for the actions of its low-level volunteers would so severely hamstring MADD's activities that it could no longer conduct its highly successful advocacy and victim support services.

So, too, all *amici* have an interest in limiting derivative liability based on unauthorized actions of a volunteer under 42 U.S.C. §1985(3) and under other federal statutes, because vicarious liability under *each* federal statute is an issue of "the general common law of agency, rather than the law of any particular State." *Burlington Indus. v. Ellerth*, 141 L. Ed. 2d 633, 648-49 (1998).

Amici's brief here supplies materials (as did *amici*'s brief before the Ninth Circuit) showing that the general common law distinguishes between volunteers and agents who are paid servants, as well as showing why "[n]o inference of agency can be drawn from activities that advance both the actor's and the organization's interests" *when both* organization and member *are engaged in the same non-profit activity* (*e.g.*, religious "good works or missionary activities" or "pursuing civil rights goals") and why "[t]he *presumption should not be one of agency* but one of *nonagency*." E.M. Gaffney, Jr. & P.C. Sorensen, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (H.C. Griffen, ed. Macon: Mercer University Press 1984) at 90 [emphasis added].

In addition, the three *amici* which are "anti-cult" advocacy organizations (AFF, Jews for Judaism and Watchman Fellowship) have a more specific interest in the application of the class-based animus test under the second clause of 42 U.S.C. §1985(3) in this case. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

Respectfully submitted,



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QUESTIONS PRESENTED*

1. Whether imposing vicarious liability for compensatory and punitive damages based solely on a volunteer's acts that were not authorized, controlled, ratified by or even known to a non-profit advocacy organization violates the First Amendment rights of association and free speech protected by this Court's rulings, notably *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)?

2. Whether 42 U.S.C. §1985(3) creates a cause of action for compensatory and punitive damages against a non-profit advocacy organization for vicarious liability based solely on a volunteer's acts that were not authorized, controlled, ratified by or even known to the non-profit?

3. Whether a class-based animus, requisite for liability under the second clause of 42 U.S.C. § 1985(3), may consist of animus against a particular church affiliation?

* HALT joins only as to Questions 1 and 2.

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* HALT joins only as to reasons A and B.

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INTEREST OF *AMICI CURIAE*[1/]

Amici are national non-profit advocacy organizations which rely heavily on volunteers. Expansion of vicarious liability by the Court of Appeals burdens *amici* with financial risks and arms those who would silence controversial messages. *Amici* deal with issues which often evoke strongly-held, conflicting positions. They prepare and disseminate materials to communicate their views in various forms.

Volunteers help *amici*'s advocacy and other work in critical ways. Volunteers share *amici*'s missions and values but perform tasks for *amici* with limited supervision; they are used part time and are also free to further their goals and earn their living independently, either as individuals or with other non-profit or business groups.

AFF, Jews for Judaism and Watchman Fellowship significantly address issues concerning groups commonly referred to as "cults" or "destructive cults." HALT does not.

American Family Foundation ("AFF") is a national non-profit dedicated to educating the public about the dangers of destructive cults. AFF publishes the *Cultic Studies Journal*, the only juried journal specializing in this field, as well as books and newsletters, and holds conferences of professionals from

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1/ No counsel for a party in this matter authored this brief in whole or in part. No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

Counsel of record also submitted a brief to the Court of Appeals in this matter on behalf of *amici*. Counsel of record has represented petitioner in other matters, including appeals regarding bankruptcy sale of CAN's name culminating in *CAN v. Martino*, 151 F.3d 605 (7th Cir. 1998), final stages of CAN's Section 7 bankruptcy and as a registered lobbyist.

multiple disciplines for the public as well as workshops for families and ex-members. AFF has eight paid staff and at least ten times more volunteers drawn from clergy, education, law enforcement and legal, medical and mental health professions. AFF objects to unethical conduct by destructive groups and exploitation of the vulnerable whether carried on by religious or secular groups but respects informed voluntary decisions of adults. Its perspective is wholly secular and involves no theological positions.

HALT, Inc. — An Organization of Americans for Legal Reform ("HALT") is a national non-partisan non-profit organization with over 50,000 members, dedicated to helping Americans handle their legal affairs simply, affordably and equitably. HALT conducts educational and advocacy programs that promote self-help law materials, the right to litigate *pro se*, the use of independent paralegals, and attorney accountability — controversial positions that question unauthorized practice of law regulations enforced by the states and the adequacy of state-administered attorney discipline systems. HALT publishes and distributes self-help law materials and a quarterly newsletter, and maintains an internet site whch incíudes materials prepared by HALT staff and by volunteers who submit articles. It also provides a referral service of volunteer attorneys.

Jews for Judaism is a national non-affiliated non-denominational non-profit serving the whole Jewish community. Its principal purpose is to provide information on methods and practices of deceptive missionary and cult groups that target the Jewish community for conversion. It facilitates and promotes positive Jewish experiences in dealing with such deceptive groups, through counseling services, outreach programs for unaffiliated and estranged Jews, encounter groups, lec-

tures and production of books, periodicals, pamphlets, and video and audio material.

Watchman Fellowship is a non-profit, international, Christian ministry concerned with cults and new religious movements. Its focus is research, education and counseling family of cult members and interventions with cult members. It publishes training materials and two magazines. It works with twenty paid staff in seven states and one foreign country, and at least as many volunteers. It has an Evangelical Christian theological stance.

CONSTITUTIONAL PROVISION AND STATUTE

The First Amendment to the United States Constitution and pertinent provisions of 42 U.S.C. §1985(3) are set forth in Appendix A.

STATEMENT

Respondent Jason Scott won a judgment against petitioner, Cult Awareness Network ("CAN"), including $87,500 for the state tort of referral negligence and $1,000,000 for punitive damages under 42 U.S.C. §1985(3). CAN's liability depended entirely on holding that Shirley Landa, a volunteer "contact person" of CAN who is not a defendant, acted on CAN's behalf (rather than independently of CAN) (a) in making a referral and (b) in allegedly conspiring to deprive Mr. Scott of his right to travel to Mexico motivated, it was claimed, by an invidious class-based animus against Mr. Scott's church, Life Tabernacle Church of Seattle.

Mr. Scott's mother had become hostile to the Life Tabernacle Church while a member, left the church and then got in

touch with Ms. Landa (without contacting CAN or knowing it existed) seeking victim support. Ms. Landa referred her to defendant Rick Ross, who involved the other individual defendants. None of the defendants was a CAN agent.

Mr. Ross convinced Mr. Scott's two younger brothers, both minors, to leave the church as their mother wished, but he failed to get Mr. Scott to meet with him. Mr. Ross and the other individual co-defendants later wrongfully abducted and detained Mr. Scott on his mother's behalf in 1991 in order to persuade him to leave this church.

CAN did not condone the wrongful conduct. Long-standing CAN policies condemned such conduct. CAN, headquartered in Illinois, never heard of the plans before Mr. Ross's unlawful conduct. CAN believed Ms. Landa's statements that she had not condoned or participated in or plotted the unlawful conduct of the individual defendants. Although Ms. Landa held no office in the CAN organization, being a part-time, low-level volunteer, years earlier she had been a founding board member of CAN's predecessor.

Ms. Landa did not use CAN's name, letterhead, telephone line, premises or equipment. She was neither an employee nor a paid contractor for CAN.

The District Court held that Ms. Landa was CAN's agent and that CAN authorized and ratified her actions. It reasoned that CAN could have terminated Ms. Landa's status as a volunteer "contact person" and had not done so after Mr. Scott's allegations. It held that unspecified "inflammatory information on cults" disseminated by Ms. Landa to Mr. Scott's mother (supposedly in accord with CAN practice) was causally related to Mr. Scott's abduction and indicated conspiracy. The District

Court also regarded materials on cults to "be negative and highly inflammatory by definition" and, therefore, as grounds for sustaining the million dollar punitive damages award. The District Court did not discuss the only specific example of CAN-disseminated materials which was in evidence (appended hereto as Appendix B).

The Court of Appeals affirmed. Judge Beezer's majority opinion stated both that "CAN has been directly linked to the acts of its agent Landa" and that "CAN is not being held liable for any of its speech or associations, but rather for its agent's involvement." Pet. App. A-12. It did not mention any supposedly "inflammatory" materials on which the District Court had relied. The majority declared that this Court merely held in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), that: "Because the NAACP's spokesman was not liable, the NAACP, as his principal, could not be held liable." *Id.* In conflict with decisions of other circuits, the majority also held that vicarious liability for compensatory and punitive damages may be imposed under 42 U.S.C. §1985(3).

Dissenting, Senior District Judge Schwartzer held that Ms. Landa (although sometimes CAN's agent) had not acted on CAN's behalf here. Pet. App. A-20, *Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998).

CAN unsuccessfully sought rehearing. Judge Kozinski, joined by Judges Pregerson, Reinhardt, Kleinfeld, Hawkins, Tashima and McKeown, dissented from denial of rehearing *en banc* on two grounds: First, majority's theory that Ms. Landa was acting as CAN's agent is based on a dubious premise. More importantly, in "direct contravention of the Supreme Court's holding in *Claiborne Hardware*, the majority literally holds CAN guilty by association. .... We have taken a great

leap backwards in the protection of First Amendment freedoms." Pet. App. B-4, B-8, *Scott v. Ross*, 151 F.3d 1247, 1248, 1250 (9th Cir. 1998).

REASONS FOR GRANTING THE PETITION[2/]

A. The Court of Appeals has put non-profit advocacy organizations at great risk by letting lower court views of the common law as well as reliance on unspecified and unscrutinized "inflammatory" literature trump this Court's interpretation of the Constitution. Disregard for First Amendment limitations established by this Court's precedents culminating in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), will have a chilling effect as Judge Kozinski explained for the seven dissenters below. If there were any question about *Claiborne Hardware*'s viability, plenary review of the expansion of vicarious liability below would be urgent to refresh a vital Constitutional legacy. Because the dissenters correctly argue that the Ninth Circuit has flouted *Claiborne Hardware*'s doctrine, this Court may wish to consider summary reversal.

B. It is important to review agency and tort law policy, as interpreted below, in light of First Amendment considerations because of the vital role of volunteerism in our society. For reasons of uniformity, "the general common law of agency" governs under each federal statute "rather than the law of any particular State," as this Court reiterated six months ago. *Burlington Indus. v. Ellerth*, 141 L. Ed. 2d 633, 648-49 (1998). This case offers the opportunity to focus both on: (1) critical differences between master-servant and, even paid, non-servant agency relationships and (2) more fundamentally, on which activities entail any agency relationship at all between non-

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2/ HALT joins only as to reasons A and B.

profit organizations and *unpaid member/ volunteers*? As a matter of general common law, liability (particularly punitive liability) for conduct of a member should not be imposed on a non-profit association unless the non-profit was specifically involved in the misconduct. And there should be a *presumption* of *nonagency*. Indeed (and *a fortiori*), the Ninth Circuit's application of 42 U.S.C. §1985(3) below put it in conflict with *every other court* that has considered whether compensatory or punitive damages may be imposed solely on the basis of *respondeat superior* (cases that involved paid-employee agents).

C. Application of 42 U.S.C. §1985(3) also involves an inter-circuit conflict as to whether animus against a religious affiliation meets the class-based animus test. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

A. This Court's vital First Amendment precedents which the Court of Appeals evaded preclude derivative liability of a non-profit advocacy organization for compensatory and punitive damages based solely on a volunteer's acts that were not authorized, controlled, ratified by or even known to the non-profit.

Claiborne Hardware established the highest First Amendment protection for advocacy (even if mixed with some unlawful violence); it required independent appellate scrutiny of the record; and it applied these principles both as to alleged conduct of a paid agent and, independently, as regards alleged liability of his non-profit principal. As Judge Kozinski explained, "*Claiborne Hardware* limits derivative liability to protect freedom of association." Pet. App. B-6, 151 F.3d 1247, 1250. In his words, the Court of Appeals, devoting merely "a single sentence" of "[f]allacious reasoning" to that seminal First Amendment case, brushed aside *Claiborne Hardware*. *Id.* at B-5.

> The reach of strict vicarious liability is potentially endless, and crushing verdicts based on such attenuated claims can easily silence nonprofit organizations. As the Court explained in *Claiborne Hardware*: "To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it."

Id. at B-6/7. That happened to CAN, a troubling result "regardless of where one falls on the political spectrum."[3/]

Particularly disturbing was the District Court's reliance upon unspecified literature expressing CAN's controversial positions on "cults" and "mind control" as bases for imposing both compensatory and punitive damages on this advocacy non-profit. The District Court found that Ms. Landa was an "active member" of CAN who gave literature to Mr. Scott's mother which must be inflammatory "by definition." Pet. App. D-3, D-6, D-7. But neither it nor the Court of Appeals evidenced having read the contents of any "inflammatory" material at all, much less of satisfying this Court's ruling, quoted by Judge Kozinski:

> As the Supreme Court has noted: "[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation 'to make an independent examination of the whole record' to make sure that 'the judgment does not constitute a forbidden intrusion in the field of free expression.'"

[3/] *Id.* at B-7 (an observation as aptly characterizing the seven judges who joined in the dissent as it does Judge Kozinski's illustrative examples: ACT UP, Planned Parenthood and the NRA).

Pet. App. B-6, quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

Were *Claiborne Hardware* a *sui generis* case, one might be tempted to overlook the bald conflict between the Ninth Circuit majority and this Court's precedent. But *Claiborne Hardware* builds on several decades of jurisprudence starting with *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 304-05 (1925) and *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 395 (1922) (where alleged conspiracy by local labor union was not authorized, ratified or apparently authorized by national union, only the local could be liable). *See also* rejections of argument that a national organization *implictly* ratified a volunteer's actions by failure to terminate his status.[4/]

As *Claiborne Hardware* and the dissent in *Overstreet* (which it endorses) stress,[5/] it is vital that non-profit associations engaged in bringing matters of controversy before the public should not have their rights and the rights of their members chilled by the threat of liability such as is raised here. These principles endure, even though areas in controversy may shift over the years — areas which today include environmental advocacy, abortion, tax reform, health care, civil justice reform, limits on government role in society, homelessness and discrimination based on race, religion, national origin or sexual preference.

[4/] Justice Douglas in *NAACP v. Overstreet*, 384 U.S. 118, 125 (1966) (dissent), *reh'g denied*, 384 U.S. 981 (1966); and Justice Brennan in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *see also* Justice Harlan's concurrence. 383 U.S. at 742.

[5/] *Claiborne Hardware*, 458 U.S. at 932-33, quoting with approval Mr. Justice Douglas's dissent from dismissal of a writ of certiorari.

In view of the conflict below with past decisions of this Court, the Court may wish to consider summary reversal.[6/]

B. It is important to determine whether the general common law of tort and agency also precludes derivative liability for compensatory and punitive damages under 42 U.S.C. §1985(3) based solely on acts of a volunteer that were not authorized, controlled, ratified by or even known by the non-profit, especially in light of the inter-circuit conflict.

Because volunteerism plays so vital a role in our society, it is important to review interpretation of agency and tort law policy under this statute — as illuminated by First Amendment considerations. Where "a uniform and predictable standard must be established as a matter of federal law" in implementing a federal statute, "the general common law of agency rather than the law of any particular State" guides interpretation of the statute, with this Court looking to text books as a point of departure. *Burlington Industries v. Ellerth*, 141 L. Ed. 2d 533, 648-49 (1998), quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989).

[6/] This Court has summarily reversed even the highest Court of the State of Washington in order to vindicate federal law. *See, City of Seattle v. Beezer*, 376 U.S. 224 (1964). Here, both the District Court and Judge Beezer's majority opinion "blindly applied" their own projections of State of Washington tort and agency doctrine, where the highest court of that State had not spoken, instead of either applying *Claiborne Hardware* "to prevent chilling the right of free association" or interpreting agency law as regards volunteers so as to avoid the First Amendment issue. *Constitutional Law*, 96 HARVARD L. REV. 62, 171, 176 (1982).

Even within the sphere of *commercial* agency relationships,[7] texts differentiate servant from non-servant agency. The RESTATEMENT (SECOND) OF AGENCY (1957) ("RESTATEMENT") sharply distinguishes master-servant[8] from other forms of commercial agency. Prosser and Keeton, explain:[9]

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[7] *I.e.*, relationships characterizing consent by principal and agent for (1) agent to act on behalf of the principal and (2) primarily for principal's benefit (3) with right of the principal to control conduct of the agent relative to the undertaking, or (4) a representation of agency and reliance thereon. E.M. Gaffney, Jr. & P.C. Sorensen, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (H.C. Griffen, ed. Macon: Mercer University Press 1984) at 34.

[8] *See* RESTATEMENT § 220(2) and Comment thereupon, especially *h. Factors indicating the relation of master and servant* ("The relation of master and servant is indicated by the following factors: an agreement for close supervision or *de facto* close supervision of the servant's work; work which does not require the services of one higly educated or skilled; the supplying of tools by the employer; payment by hour or month; employment over a considerable period of time with regular hours; full time employment by one employer; ... ; the fact that the community regards those doing such work as servants; the belief by the parties that there is a master and servant relation; an agreement that the work can not be delegated.") *See also* RESTATEMENT definitions and comments which stress receipt of money or other property as key factors in defining responsibility (*id.* 14 L.(2)) and primary allegiance (*id.* § 14 L. Comment on Subsection (1)*a.*), concepts at odds with unpaid volunterism and its multiple relationships. And *see* RESTATEMENT §251 limiting liability of a principal for acts of a non-servant agent.

[9] W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 508 [footnote omitted] (5th ed. 1984). American jurisprudence recognizes vicarious liability and *respondeat superior* as doctrines based on social policy considerations rather than on fault or evidentiary problems of proof. 5 Harper, James & Gray, THE LAW OF TORTS 2-23 (2d ed. 1986) (Vicarious Liability, Topic A. Bases in History, Reasoning and Policy); Prosser and Keeton, *supra*,, at 499-500. These doctrines emerged with little need for attention to the nonprofit sector since charitable immuni-

> Since an agent who is not a servant is not subject to any right of control by his employer over the details of his physical conduct, the responsibility ordinarily rests upon the agent alone, and the principal is not liable for the torts which he may commit.

In contrast to commercial enterprises that rely largely on employees (as well as independent contractors), non-profits commonly rely on unpaid members, unrelated persons who support their ideals and concerns, and other volunteers — in order to leverage their ability to fulfill their goals. Risks of "ascending liability" for acts or omissions of volunteers concern non-profit associations in their day-to-day work.[10/] Of particular concern is expansion of liability to cover what a volunteer advocates as regards a controversial issue. As the Mothers Against Drunk Driving ("MADD") *amicus* letter to the court below states:

> MADD's programs [of public awareness, education, legislation and aggressive enforcement] are furthered by the efforts of tens of thousands of unpaid volunteers at the local level. These persons are not officers, employees or directors of MADD, but rather volunteers committed to MADD's mission. MADD's national office does not exercise control over the activities of the individual volunteers. To hold MADD liable under a

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ty from tort liability then flourished. The pragmatic judicial objectives of vicarious liability are either accident prevention or allocation of risk to those best able to pay. 5 Harper, James & Gray, *supra*, § 26.3 at 14-15; Prosser and Keeton, *supra*, at 500.

10/ Gaffney & Sorensen, *supra*, and M.E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADVOCACY 289 (1993)

> *respondeat superior* or vicarious liability theory for the actions of its low-level volunteers would so severely hamstring MADD's activities that it could no longer conduct its highly successful advocacy and victim support services.

The case of a *volunteer* non-servant dramatizes critical differences, some apparent in the general common law but all overlooked below. Most fundamentally: As to what acts does *any* agency relationship exist in the case of non-profit organizations with which unpaid member/volunteers associate in order to advance a shared mission? Professors Gaffney and Sorenson's analysis — which leads them to urge a *presumption* of *nonagency* — shows the importance of reviewing this case.[11/]

> The requisite characteristics of an agency which give rise to vicarious liability ... raise unique problems when applied in the nonprofit context. While the application of agency concepts would not differ in the profit and nonprofit contexts when the relationships remain the same (for example, employer-employee), there are unique nonprofit relationships to which their application raises distinctive issues.
>
> * * * * *
>
> A church ... may be liable for negligence of its employees, yet it does not necessarily follow that members of its congregation are to be viewed as working on behalf or for the benefit of the church whenever they engage in good works urged upon them by church doctrine. Nor is it clear that it would make a difference, in terms of benefit to the church, if the work were done in the name of the church in response to an aspirational com-

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[11/] *Id.* at 34-38 [footnotes omitted].

mand thereof. Does a Boy Scout in uniform, by assisting an elderly person across the street, benefit the Boy Scouts of America? Is his action on behalf of the scout organization? There are obvious differences, it would seem, between serving an organization and serving that organization's ideals—between accomplishing duties assigned by an organization and pursuing its members' common interests or shared aspirations.

* * * * *

Activities by officers and employees and by related organizations in the profit sector do not ordinarily present problems as to on whose behalf or benefit they are taken. The status of the relationship or the scope of the employment generally resolves that issue. Activities by members or affiliates of nonprofit organizations can, however, be ambiguous because neither the members' affiliates' status, nor the scope of accepted or anticipated membership activity, is determinative. In organizations formed because of shared beliefs or ideals (religious, political, and ideological groups), acts by members or affiliates constituting an expression of those beliefs and ideals are not necessarily done on behalf of and primarily for the benefit of the organization. Members and affiliates of a nonprofit ... engage in many activities ... [that] resemble ... those ... normally carried on by a customer, a principal, or just an interested bystander. Whether these activities should be adjudged to be on behalf of the organization and for its benefit cannot be measured by relational labels or a "scope of membership" test. Neither aegis nor affiliation in the nonprofit sector is able to provide ready answers.

* * * * *

Doctrinal control aside, authority and the right to control are often ambiguous and multidirectional in non-

> profit groups. Confusion and jurisdictional overlap are common—a circumstance not too surprising when the participants have no economic stake in how the lines of authority are run. Moreover, authority and control, rather than being fixed, may shift with time, circumstances, and personalities. In contrast, prerogatives and lines of authority in profit organizations tend to be definite and distinct.

Professors Gaffney and Sorenson (like the dissenters below) identify the serious question whether any agency relationship is involved in the conduct at all (possibly obviating whether the vicarious liability issue even need be reached):

> Often an activity could be on behalf of and for the benefit of either the organization or the member ... No inference of agency can be drawn from activities that advance both the actor's and the organization's interests. The presumption should not be one of agency but one of nonagency.

Id. at 90. In construing 42 U.S.C. §1985(3), this Court has the opportunity to adopt a presumption of *nonagency* in the case of non-profits engaged in advocacy.

Inexplicably disregarding decisions of other circuits which restrict vicarious liability even of an *employer-superior* for compensatory and punitive damages under 42 U.S.C. §1985(3), the Ninth Circuit made vicarious liability the general rule — and applied it to a non-profit for acts of its volunteer. Other circuits follow a rule limiting exposure of *any* superior to injunction only (but not damages, compensatory or punitive) absent "overt acts" (*Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971)) or absent direct involvement through official policy

(*Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979)). Treating the issue as one of novel impression, the court below chose a rule that maximizes inter-circuit conflict and exposes to vicarious liability both non-profit advocacy groups and other organizations of all kinds.

C. Circuits are divided on the important question under 42 U.S.C. §1985(3) whether animus against a church affiliation satisfies the class-based animus test.[12/]

The case presents an opportunity to resolve the conflict as to whether an animus against a religion or church affiliation satisfies the invidious, class-based animus test that this Court's precedents set for private litigation under the second clause of 42 U.S.C. §1985(3). In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), this Court held that *private* racially-motivated conspiracies, involving no state action, could give rise to a claim but warned that this statute was not "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Id.* at 101. Although *Griffin* speculated that some "otherwise class-based, invidiously discriminatory animus behind the conspirators' action" might "perhaps" also be covered (*id.* at 102), only in cases of racial animus against Americans of African descent has this Court held the test to be satisfied. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), discussed, without deciding, whether an animus against women might satisfy the test.

Earlier, without the benefit of this Court's majority and dissenting opinions in *Bray*, the Fourth Circuit had rather summarily held that a religion-based animus could be a basis for a

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12/ Only AFF, Jews for Judaism and Watchman Fellowship join in this reason for granting the petition.

claim. *Ward v. Conner*, 657 F.2d 45 (4th Cir. 1981). Subsequently, the Fifth Circuit summarily reached the opposite conclusion. *Word of Faith Outreach Church Ctr. v. Sawyer*, 90 F.3d 118, 124 (5th Cir. 1996).

Ward involved abduction of a member of the Unification Church in order to "deprogram"[13] him and District Court dismissal of 42 U.S.C. §1985(3) claims against plaintiff's closest blood relatives and others. *Ward v. Conner*, 495 F. Supp. 434 (E.D. Va. 1980). The District Court distinguished between bias related to immutable characteristics (*e.g.*, race, national origin and sex) and ideological ones; and it also held that the defendants were motivated by parental concern for the plaintiff's well-being rather than any discriminatory bias. The Fourth Circuit reversal reached a sweeping conclusion (logically applicable to both political and religious affiliations) based on a single floor speech in the legislative history of the 1871 statute that a conspiracy formed against a man because he was "a Democrat ... or ... a Catholic, or ... a Methodist" presents a requisite animus. 657 F.2d at 48.

Here, the Court will have opportunity to weigh differences between a person's immutable characteristics and his or her ideological affiliations (religious or secular) in light of the overall legislative purpose. And considering a rationale of animus against ideological affiliations, this Court will be able to weigh nuances of subsidiary issues.[14]

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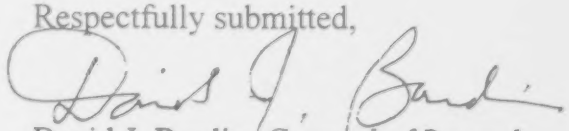
[13] "Deprogramming" standing alone (without unlawful abduction or detention) consists of breaking "the hold of the cult over the individual though reason and confrontation." *Peterson v. Sorlien*, 299 N.W.2d 123, 127 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981).

[14] For example, whose animus? Ms. Landa had not even heard of the Life Tabernacle Church before Mr. Scott's mother sought to extricate him

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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December 1998

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from it (and CAN's office had not heard of it until after all of the unlawful misconduct). Indeed, the District Court regarded CAN's admitted lack of personal knowledge about Mr. Scott's church as a ground for sustaining punitive damages.

APPENDIX

APPENDIX A

CONSTITUTIONAL PROVISION AND STATUTE

The First Amendment to the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. §1985(3) reads, in pertinent part (emphasis of second clause added):

> If two or more persons in any State or Territory conspire ... **for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws**;...; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

APPENDIX B

CAN Materials in the Record

Text of two 1990 CAN 3"x 8½" brochures

Retyped from Exhibit 39 (4 pages)
in the trial record below

What Can You Do? B-1
Do's and Don'ts B-2

CAN at a Glance B-3

WHAT CAN YOU DO?

- Inform yourself, your family, and your friends about these groups and what they represent.
- Encourage your school, college, synagogue, church, or office to arrange a program on cults.
- Donate books on destructive cults to your local library.
- Investigate any "training" program offered or required by your company, place of employment, or in the military; do not use current advocates of the program exclusively in your investigation.
- Write your members of congress, senators, state and local officials. Tell them of your concern and report illegal or unethical activities of destructive cults. Assure them that the issues is not one of beliefs but of human rights.
- Encourage media outlets to cover cult activity and respond constructively when such programs air or appear in print.
- Find out if solicitation permits are required in your area. Ask what limitations/ordinances apply to collecting/selling door-to-door, soliciting in shopping centers, or on the street.
- Always ask questions about a solicitor's identity or affiliation. Ask for a valid Federal identification number from charities you want to give to. Call the IRS to verify legitimacy. Be suspicious of charities that have not obtained such a number. Check the Attorney General's office in your state to make sure of registration.
- Check on zoning restrictions regarding single/multiple dwellings and regulations concerning frequent "gatherings" by cults in any neighborhood.
- Never accept an invitation, give money, take a course, or join any group until you have thoroughly checked it out with someone you trust.

DO's and DON'Ts

A guide for families who think a member or friend is involved with a destructive cult:

+ **DO** record all names, addresses, phone numbers of persons known to be associated in any way with the individual's activities.
+ **DO** maintain a written chronology of events associated with the individual's activities relating to the group.
+ **DO** answer all communications from the individual in a loving, sincere, non-critical and consistent manner.
+ **DO** collect related items from newspapers, magazines, and other sources, as well as publications of the group.
- **DO NOT** send money to an individual in a cult if you can send non-cash gifts such as clothing, non-refundable airline tickets, etc.
- **DO NOT** spend large amounts of money for treatments or seminars until you have verified such programs' credentials and qualifications for handling your problem.
- **DO NOT GIVE UP!** Remember the individual is a product of your love, training, heredity, and home environment. These influences can never be permanently eliminated by any technique.
- **DO NOT** feel alone. This is a common problem faced by thousands all over this country and abroad. It affects families of every religious or socio-economic background.

DO seek help, establish and continue an association with an organized group of families with similar situations. We care about you!

READ:

Combating Cult Mind Control, Steve Hassan, Park Street Press, Rochester, VT, 1968, $16.95

Cults and Consequences, The Definitive Handbook, Rachel Andres and James R.Lane, Jewish Federation Council of Los Angeles, 1968, $14.96

Influence, Robert B. Cialdini, William Morris, New York, 1964, $12.45

Cults: What Parents Should Know, Joan Carol Ross, Ed.M. and Michael Langone, Ph.D. Carol Publishing Group, 1988, $5.95

These and other publications are available from the CAN National Office.

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CAN AT A GLANCE!

WHAT IS CAN? The Cult Awareness Network is a national non-profit organization founded to educate the public about the harmful effects of mind control as used by destructive cults. CAN confines its concerns to unethical or illegal practices, includir g coercive persuasion or mind control, and does not judge doctrine or beliefs. Funding comes exclusively from voluntary contributions.

WHO ARE WE? We are former cult members and the families and friends of past and present cult members. Some of us are mental health professionals, lawyers, physicians, legislators, clergy, law enforcement officers and educators. We represent and care about an estimated five million people who have been seriously affected by the more than 2500 destructive cults.

WHAT DO WE DO? We are dedicated to bringing to public awareness the harmful effects of destructive cults and providing information and support for families, as well as assistance to former cult members. CAN recognizes the need for voluntary exit counseling/deprogramming as a means to restore critical thinking, and supports all legal efforts to protect individuals' freedom of choice.

WHERE ARE WE? The Cult Awareness Network is a coalition of volunteer affiliate groups throughout the United States. FOCUS is a support group for former cult members. Communication is maintained with similar organizations throughout the world, including Denmark, England, France, Germany, Spain, Israel, Australia, and Canada.

WHAT IS A DESTRUCTIVE CULT? A destructive cult is a closed system whose followers have been unethically and deceptively recruited through the use of manipulative techniques of thought reform or mind control. The system is imposed without the informed consent of the recruit and is designed to alter personality and behavior.

WHO ARE THEY: Those groups that have engaged in some illegal or unethical practices, including: child abuse, neglect, and death; illegal immigration; drug dealing; fraud and deceit in their recruiting, business, financial, and fundraising activities; theft; harassment of critics, families, and former followers with threats, lawsuits, and foul play; stockpiling or smuggling of weapons and ammunition; beatings, sexual abuse and prostitution; kidnapping; murder; attempted murder; and psychological and emotional damage.

A partial list of groups about which CAN has received complaints, includes the following:

Alamo Christian Fellowship; Ananda Marga; Bible Speaks/Greater Grace World Outreach; Boston Church of Christ/Multiplying Ministries; Children of God/Family of Love; Church Universal and Triumphant/CUT; Faith Assembly; Fellowship of Friends; The Forum/est/The Hunger Project; International Society for Krishna Consciousness/ISKCON/Hare Krishnas; Jehovah's Witnesses; Lyndon LaRouche organizations: Lifespring; Maranatha Ministries; MOVE; Nichiren Shoshu of America/NSA/Soka Gakkai; Peoples Temple/Jonestown; Rajneesh Movement; J.Z. Knight; Scientology/Dianetics/Narconon and more; Sullivan Institute; Synanon; Transcendental Mediation; Unification Church/CAUSA/CARP and more; University Bible Fellowship; The Way International/PFAL/TWIG

ANYONE - *even you* - can be deceived!

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Supreme Court, U.S.
FILED
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No. 98-878

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

CULT AWARENESS NETWORK,

Petitioner,

vs.

JASON SCOTT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The petition presents questions wholly inappropriate for review by this Court on writ of certiorari, for two critical threshold reasons: (1) not one of the three questions presented were raised or preserved before the district court, and the third question was not even raised on appeal, until the petition for rehearing *en banc*; (2) with respect to the first two questions presented, the petition ultimately asks this Court to review *the facts* of this case in the face not only of the jury's verdict, but also of explicit findings by the district court (on a motion for new trial) and the court of appeals. In addition, petitioner grossly misstates the trial record below, in utter disregard of the specific findings of the district court and court of appeals, and fails to raise a compelling legal question requiring this Court's review.

Thus, in question 1, petitioner, the Cult Awareness Network ("CAN"), argues that under this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), petitioner should not have been liable for its agent's acts unless it "authorized, had knowledge of or ratified the unlawful act upon which liability is based." Pet. at i, question 1. Unfortunately, petitioner never raised this issue before the district court, either through a motion, a requested jury instruction, an evidentiary objection, or a motion for new trial. When petitioner belatedly attempted to raise the issue on appeal, the court of appeals limited its review to whether there was sufficient evidence to show that CAN was "directly linked" to the tortious acts of its agent, Shirley Landa (Pet. at A-12), which the Court readily found to be the case. Indeed, the district court, in upholding the punitive damage award, dispositively had found that "there is sufficient evidence to support the jury's finding that Ms. Landa's actions were authorized or ratified by CAN" (Pet. at

D-6), the very standard petitioner urges as appropriate under *Claiborne Hardware*. Thus petitioner's "*Claiborne Hardware*" argument, even if legally sound, amounts to an attack on the *factual* findings of the jury, the district court, and the court of appeals, hardly an appropriate basis for *certiorari* review.

The same is true with petitioner's question 2, in which petitioner asks whether 42 U.S.C. §1985(3) "require[s] the personal and direct involvement of defendant" in the acts giving rise to liability. Once again, petitioner did not raise this issue in the district court, and thus cannot complain that the district court did not instruct the jury on the issue. Once again, the court of appeals reviewed the record and found substantial evidence that CAN's agent "acted in accordance with CAN's practice of referring people to involuntary deprogrammers," (Pet. at A-14), affirming the district court's finding that CAN "authorized or ratified" Landa's acts (Pet. at D-6) and that "the reprehensibility of CAN's conduct goes far to justify the amount of the award." Pet. at D-7. Once again, CAN inappropriately asks this Court to review the factual and credibility findings of the jury, as confirmed by the district court[1/] and affirmed by the court of appeals.

Third, CAN did not preserve its question 3, "Can a 42

1/ As District Judge Coughenour commented in his order denying CAN's post-trial motions, "the main support for the CAN's argument that Ms. Landa was acting for another organization [and not on behalf of CAN] comes from Landa herself. Given the numerous illustrations of Landa'[s] bias and hostility, as well as the inconsistencies in her testimony, the Court finds that the jury was entitled to disregard this testimony." Pet. at D-4.

U.S.C. §1985(3) claim be based on alleged animus against religion," before the district court, and did not even raise it on its appeal to the Ninth Circuit, until after that court had issued its opinion and judgment affirming the judgment of the district court. Only in its petition for rehearing *en banc* did petitioner decide to raise the question, which neither the *en banc* majority nor dissent deigned to address. Neither should this Court.

Finally, as is evident from what we already have said, petitioner's description of the factual record of this case is highly selective, and is directly contrary to the findings of the district court and the court of appeals. Thus CAN's statement that the violent deprogramming at issue in this case "was one of which CAN had no knowledge . . . and . . . was not undertaken even under the apparent authority or involvement of CAN" (Pet. at 8), was expressly rejected by the district court: "CAN's attempt to distance itself from Ms. Landa's actions and Mr. Scott's deprogramming . . . belies the great weight of the evidence." Pet at D-3. Petitioner's assertion that the violent deprogramming "was contrary to CAN policy" (Pet. at 8) is negated by the findings of the district court, which found that CAN "authorized or ratified" Landa's acts (Pet. at D-6), and the court of appeals: "Landa acted in accordance with CAN's practice of referring people to involuntary deprogrammers." Pet. at A-14.

In short, the "evidence" that CAN selectively recites in its petition was sharply controverted at trial, was disbelieved by the jury, was found to be incredible by the district judge, and was rejected by both the district judge and the court of appeals in reviewing the verdict. Indeed, the petition in this case is but a further manifestation of what the district court described as CAN's "seeming incapability of appreciating the maliciousness of [its] conduct towards Mr.

Scott." Pet. at D-11. Further review by this Court is both unnecessary and inappropriate.

STATEMENT OF THE CASE

Proceedings below

After a six day jury trial, respondent Jason Scott ("Scott") won a judgment against four defendants, including petitioner CAN for conspiring to violently abduct and "deprogram"[2/] him when he was eighteen years old. Defendants' purpose was to force Scott to renounce his affiliation with the Life Tabernacle Church, a Pentecostal congregation.

CAN barely put on a defense at trial and most of the testimony elicited from CAN's representatives came out during plaintiff's case. At no time during the trial did CAN argue or seek a jury instruction that it could be found liable if and only if Landa acted pursuant to CAN's policy, or only if CAN directed, ratified, or directed Landa's acts. Rather, CAN's trial strategy was to deemphasize such issues, to argue that Landa had no connection to CAN *at all*, and to present little in the way of defense.

It did not work. The jury returned a verdict in favor of Scott under three claims: (1) conspiracy to violate civil rights under 42 U.S.C. §1985; (2) negligence; and (3)

2/ Deprogramming occurs when, at the request of a parent or close relative, a person known as a deprogrammer seizes a member of a religious sect, holds him against his will and subjects him to mental, emotional, and even physical pressures until he renounces his religious beliefs. *Colombrito* v. *Kelly*, 764 F.2d 122, 125 n.1 (2d Cir. 1985).

outrage. The jury awarded Scott compensatory damages totaling $875,000 and punitive damages against four defendants totaling $4,000,000. The jury allocated to CAN 10% of the liability under the negligence claim and found CAN liable for conspiracy to violate Scott's civil rights, for which the jury awarded Scott $1,000,000 in punitive damages against CAN. The jury did not find CAN liable for outrage. The judge denied CAN's post trial motions for judgment as a matter of law or a new trial, holding that the great weight of the evidence supported Scott's claims that Landa acted as CAN's agent, that CAN authorized or ratified Landa's tortious acts, and that "the reprehensibility of CAN's conduct goes far to justify the amount of the award." Pet. at D-7.

CAN appealed. For the first time it argued that under *Claiborne Hardware*, the First Amendment precluded CAN's liability for Scott's deprogramming. CAN contended the facts presented at trial were insufficient to demonstrate authorization by or knowledge on the part of CAN of the attempted deprogramming. Also for the first time in the action, CAN argued on appeal that 42 U.S.C. §1985(3) did not permit respondeat superior liability for a private civil rights conspiracy. CAN argued that there was no evidence before the jury establishing CAN's direct involvement in the deprogramming.

The court of appeals rejected CAN's arguments after an independent review of the record below. The court noted that while,"[i]n *Claiborne*, the evidence did not tie the NAACP to the purportedly illegal acts of its representative; here, CAN has been directly linked to the acts of its agent, Landa." Pet. at A-12. In response to CAN's argument concerning respondeat superior liability under §1985(3), the court held that, "[u]nder either traditional principles of

respondeat superior or 'policy and practice' principles, CAN would be liable. Landa acted as CAN's agent, and Landa acted in accordance with CAN's practice of referring people to involuntary deprogrammers." Pet. at A-14. Judge Schwarzer dissented.

CAN's Petition For Rehearing And Suggestion For Rehearing En Banc was denied. Judge Schroeder, a member of the original panel, wrote a concurrence noting, "the evidence was sufficient to enable the jury to find that Landa was acting on behalf of CAN and no other organization when she referred Tonkin to Ross." Pet. at B-2. In dissent, Judge Kozinski wrote that the decision violated *Claiborne Hardware* because, he contended, there was no evidence that CAN approved or authorized the acts of Landa. Judge Kozinski evidently was unaware of the district court's specific findings that CAN in fact authorized and ratified that conduct, or of the substantial evidence that CAN supported illegal deprogramming and that CAN's purported policy against illegal deprogramming was a sham.

Facts

The Abduction and Deprogramming

Scott's mother, Kathy Tonkin, arranged for his abduction and deprogramming after contacting the Cult Awareness Network's official "contact person" for Washington State, Shirley Landa. Scott, who was eighteen, and two of his younger brothers, who were minors, continued to be members of the Life Tabernacle Church, a Christian congregation affiliated with the United Pentecostal Church International, even after Tonkin had left the church. Tonkin learned of Landa through a local "hot line" on which

Landa was listed as a resource regarding cults. Although she had no information concerning the Life Tabernacle Church or its pastor, Landa advised Tonkin that her children were the victims of "cult brainwashing" and that they had to be deprogrammed. Landa told Tonkin that she was "one of the co-founders of the Cult Awareness Network."

Landa convinced Tonkin to retain Rick Ross for the deprogramming of Tonkin's children. Landa reported that Ross was "very well known in [his] business and w[as] very good and had a high success rate." Landa knew that Ross used violent deprogramming techniques because she had watched a videotape of the television show *48 Hours* which depicted Ross forcibly deprogramming a teenage boy.

Based on Landa's referral, Tonkin contacted Ross. Ross agreed with Landa's conclusion that Tonkin's children were "brainwashed" and needed to be "deprogrammed." Ross proposed that the two minor boys be deprogrammed first, since deprogramming Scott, an adult, presented a "more complicated legal situation." Immediately after speaking to Ross, Tonkin called Landa and told her a deal had been struck with Ross and informed her of the deprogramming arrangements. Tonkin also telephoned CAN.[3/]

The deprogramming of Scott's two younger brothers lasted for four days. After the deprogramming, the younger brothers left the Life Tabernacle Church. Shortly thereafter, one of the younger brothers gave Scott printed material from the Cult Awareness Network that he had received at the deprogramming.

[3/] Although at trial Tonkin denied contacting CAN directly, her testimony was impeached by her earlier deposition testimony in which she admitted that she, "made a phone call" to CAN.

During the deprogramming of the younger boys, Landa and her daughter, Susan Landa, an attorney, went to the house where the boys were held. Landa and her daughter talked to Tonkin regarding the planned deprogramming of Scott, and told Tonkin that she had no legal remedy because Scott was eighteen years old.[4/] After the deprogramming of the younger boys, the deprogrammers visited with Landa at her house.

Several weeks later, the abduction and attempted deprogramming of Scott took place. Scott was tackled, bound, and carried into a van. Ross and his men then drove Scott for several hours to an isolated house where he was forced into a room that had been specially prepared for his captivity. Thick nylon webbing had been installed over the windows to prevent his escape. Scott's shoes were confiscated.

Scott demanded that he be permitted to leave and asked Ross if he was going to try to change his mind against his will. Ross responded, "Yeah, that's what I'm paid to do." Scott threatened the kidnappers with prosecution. Ross laughed at him, stating, "You're not going anywhere and if you give me any problems, I'm going to handcuff you to the

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4/ Petitioner describes the deprogramming of Scott's brothers with the antiseptic phrase "a legal and successful effort." Pet. at 5. Respondent submits that a forced kidnapping, abduction, repeated assault and battery, and imprisonment for four days of a sixteen year old "minor," against his will, for the purpose of coercing him to abandon his religious beliefs, is not rendered "legal" just because his mother is one of the co-conspirators. While parents may attempt to instruct their children on moral and religious matters, they are not free to literally physically beat them into submission.

bed frame, and its going to be more uncomfortable than the ride over here."

Ross spent hours degrading Scott's methods of worship, the doctrinal beliefs of his Church, and his beliefs in God, the Bible, salvation, holiness and baptism. These verbal assaults continued until late into the night. When Scott was finally permitted to sleep, a guard slept in front of each of the room's two doors to prevent escape. When Scott went to the bathroom, at least one of the deprogrammers accompanied him. Scott was forced to watch a succession of videotapes as part of the deprogramming. Ross called Scott names, belittled his girlfriend, his pastor, and his faith. Scott was told he would not be free until the deprogramming was concluded.

The purpose of the deprogramming was to induce Scott to renounce and leave the Life Tabernacle Church. In correspondence to CAN, Ross had previously derided "holy rollers" and "bible bangers." A second purpose was to prevent Scott from leaving the country to become a missionary. In furtherance of the conspiracy, the deprogrammers planned and had bought an airplane ticket to send Scott to a "rehabilitation" facility called "Wellspring" which was located in a remote area of rural Ohio. Wellspring was operated by CAN Board member Paul Martin. The jury could and undoubtedly did conclude that Martin was aware of and approved the entire scope of action of the conspirators.

On the fourth day of captivity, Scott decided to feign acquiescence, in the hope that his captors would become careless and give him an opportunity to escape. Scott convinced his captors that he was ready to renounce his faith. He broke down in tears and remorse.

Scott's ploy succeeded. At the deprogrammers'

suggestion they went out to dinner to celebrate Scott's apparent conversion. Scott excused himself to go to the men's room. He ran out of the front door of the restaurant and called the police from a telephone across the street. After the police arrived, Ross contacted Landa for assistance and legal advice.

The next day, Scott was examined by a physician. At trial the physician testified that he had found a deep scratch on Scott's left knee; multiple bruises on both arms, his left thigh, and shin; and scratches on his back and knee. Scott complained that his wrists hurt and that he had a sore back and neck, intestinal problems, headaches and anxiety. According to a therapist who testified at trial, Scott suffered emotionally from the traumatic event. Moreover, Scott's relationship with his family was destroyed and remained so through the trial.

CAN's Involvement In The Deprogramming

At trial, Scott put on substantial evidence of Landa's twenty year relationship with CAN, of her authority to act on behalf of CAN, of her involvement in the deprogramming itself as CAN's agent, of CAN's ratification of her acts in the deprogramming of Scott, and of CAN's involvement in such illegal deprogramming despite its asserted policy opposing such practices. Scott made his case through the deposition testimony and cross-examination of CAN's President William Rehling, the deposition testimony of CAN's Executive Director Cynthia Kisser, the deposition testimony of CAN staffer Martin Butz, the deposition testimony of CAN Board member Paul Martin, the direct testimony of Shirley Landa, the cross-examination of Kathy Tonkin, and through the expert testimony of Anson Shupe.

In contrast, CAN barely put on a defense with regard to these important issues. The only testimony from a CAN witness during CAN's case came from William Rehling, CAN's Board President. His direct testimony takes up barely seven pages of the trial transcript. CAN's lawyers studiously avoided asking Rehling whether Landa was acting on behalf of CAN when she assisted in the deprogramming of Scott.

CAN also relied upon the testimony of Landa herself. Yet, as the district court held, "Given the numerous illustrations of Landa'[s] bias and hostility, as well as the inconsistencies in her testimony, the Court finds that the jury was entitled to disregard this testimony." Pet. at D-4.[5/] Landa admitted that she was a founder of Citizens Freedom Foundation ("CFF"), CAN's previous corporate title. CFF was founded in the mid-1970s; Scott presented substantial evidence that CFF supported and was involved with involuntary deprogrammings. Landa testified that she continued to be a member of CAN since its founding. She admitted that she had been a member of CAN's Board of Directors.

Landa testified that she has been CAN's "contact person" in the State of Washington for the last 20 years, acting on behalf of CAN concerning "alleged cult matters in Washington" and that CAN refers people to her and uses her name as a referral in Washington State. Cynthia Kisser, CAN's Executive Director, testified that Landa was CAN's

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[5/] For example, Landa testified that what she knew of Ross she learned from viewing a videotape of the show *48 Hours* which depicted one of Ross' deprogrammings. Yet, Tonkin testified that Landa and Ross were old friends, "They had talked on the phone, I believe, for years."

"contact person" for the Washington area in 1991, during the events at issue in this case.

CAN's President Rehling testified that Landa was CAN's contact person, noting, "Contact people are people who are available to be contacted to encourage communication . . . if someone needed to speak to a representative of CAN, they can deal with the contact person." He stated that contact persons act on behalf of CAN and that "[C]ontact people are authorized to represent to members of the public that they are assisting on behalf of CAN." Significantly, Rehling testified that CAN retained the authority to remove contact persons from that status for violation of policy.

When Tonkin contacted Landa, Landa identified herself as a CAN representative. Moreover, in referring Tonkin to Rick Ross for involuntary deprogramming, Landa did what had been done hundreds of prior times by CAN, its Executive Directors, employees, and its agents. Scott introduced deposition testimony from CAN national office worker Martin Butz, who staffs CAN's national hotline. Butz testified that in his position with CAN he had made hundreds of referrals to deprogrammers. Butz further testified that he made approximately a dozen referrals to Ross, even after seeing the *48 Hours* video showing Ross forcibly deprogramming a teenage boy. Rehling, the only individual put on the stand by CAN, did not know whether or not CAN regularly made referrals to Ross.

Moreover, the jury had before it handwritten letters that Ross sent to CAN executives Cynthia Kisser and Priscilla Coates soliciting deprogramming business. There were also several testimonials from CAN executives supporting Ross in this solicitation. Ross attended numerous CAN conventions, including conventions in 1985, 1990,

1991, and 1992. Among his activities at these CAN conventions, Ross met with other deprogrammers. Ross admitted at trial that he had received referrals from CAN that resulted in deprogrammings. Even CAN Board member Paul Martin, who himself runs the very deprogramming retreat to which Ross intended to send Scott, and who therefore was a co-conspirator of Ross and Landa, described Ross as someone who conducts illegal involuntary deprogramming and contrasted Ross to other deprogrammers who did not engage in Ross' tactics. This knowledge did not inhibit Martin from conspiring with Ross concerning Scott's deprogramming. Indeed, Ross admitted that in 1989 he decided to do involuntary deprogrammings and he claimed that ten percent of his deprogrammings were involuntary.

CAN asserted that in 1988 it instituted a policy against involuntary deprogramming. Scott proved that this purported policy was in fact a sham. Anson Shupe, an independent academic expert and writer on the anti-cult movement, testified without contemporaneous objection that despite CAN's public pronouncement of a policy against illegal deprogramming, in fact CAN supported such illegal deprogramming. Moreover, on cross-examination, CAN's President Rehling admitted that several CAN employees had been convicted of illegal deprogramming activities. Thus, Rehling admitted that a paid security person for CAN, Galen Kelly, who had been criminally convicted of deprogramming activities, continued to work for CAN until he was subsequently arrested for kidnaping in 1992. Moreover, CAN took no action against Landa and did not remove her from her position as Washington contact person after it learned of her participation in the illegal deprogramming of Scott.

Although CAN made the bald assertion that it had a

policy against illegal deprogramming, it introduced no evidence of internal communications on this matter and no evidence of efforts to enforce this policy among its network of contact persons and other staff and volunteers. The jury, of course, was entitled to disbelieve CAN's claim, and to find that CAN continued to support and encourage violent and illegal deprogramming through individuals such as Landa and Ross, while at the same time attempting to conceal CAN's role in them.

REASONS WHY THE PETITION SHOULD BE DENIED

1. *Certiorari Should Not Be Granted To Review Questions Not Properly Preserved Below, Or Which Are Essentially Factual In Nature*

As we have shown, none of the questions upon which certiorari is sought were properly raised or preserved below. Thus, petitioners never raised their *Claiborne Hardware* or respondeat superior arguments in the district court by motion, evidentiary objection, requested jury instructions, or motion for a new trial. Instead, petitioners made a tactical decision to rest on their claim that Landa was not CAN's agent at all. Only on appeal did petitioners introduce arguments that it was improper to hold CAN liable for Landa's actions unless CAN directed, authorized or ratified Landa's actions, or that Landa acted pursuant to CAN's policy and practice.

The court of appeals considered these arguments only to the limited degree of determining whether the evidence supported plaintiff's claims. It had no difficulty in affirming the district court's explicit findings that CAN in fact

authorized and directed Landa's acts, that CAN had a *de facto* policy of supporting and encouraging violent deprogrammings, and that Landa acted on behalf of CAN in furtherance of that *de facto* policy.

Accordingly, CAN's petition essentially seeks review by this Court of the explicit and careful factual findings of the district court and the court of appeals, on questions that were not even directly raised at trial. It is difficult to imagine a more inappropriate effort to invoke this Court's limited discretionary jurisdiction.

This Court simply does not grant review to determine whether the district court, which of course was present at trial, and the court of appeals made factual errors. After all, "A court of law, such as [the Supreme] Court [ ], rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of errors." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (citing *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 226, 275 (1949). Here, petitioner has made no showing that approaches the "obvious and exceptional" standard, and certiorari should not be granted.

2. *Petitioner's Claiborne Hardware Argument Is Both Factually and Legally Without Merit*

Relying exclusively upon a strained and overly expansive interpretation of this Court's decision in *Claiborne Hardware*, petitioner argues that "Liability can only be imposed upon a showing that there was authorization, knowledge, or ratification of the unlawful act upon which liability is based." Pet at 14. Yet nowhere in its petition

does CAN acknowledge the explicit finding of the district court:

> The Court finds that there is sufficient evidence to support the jury's finding that Ms. Landa's actions were authorized or ratified by CAN.

Pet. at D-6. See *id.* at D-6 to D-7, where the district court recited some of the evidence, "by way of example," supporting its finding.

It quite frankly is shocking that petitioner would make this argument, without pointing out to the Court the district court's findings. The significance of the district court's findings, of course, is that they reduce petitioner's argument to a factual dispute, rather than a question of law. Petitioner can prevail if and only if this Court accepts review for the purpose of examining the factual findings of jury, judge and appeals court, a purpose which we have shown is highly inappropriate. Moreover, petitioner is barred from any other legal argument premised on its *Claiborne Hardware* analysis because it never raised the issue below.

In any event, petitioner reads too much into *Claiborne Hardware*, positing it as imposing a broad new rule limiting the liability of "an organization that engages in constitutionally protected associational and speech activity." Pet. at 13. Such a rule, of course, would be boundless, since virtually every organization, including ordinary business corporations, engage in such protected activity. Certainly nothing in *Claiborne Hardware*, or in any other subsequent case, suggests that this Court intended to impose a revolutionary new rule prohibiting imposition of vicarious liability for the unprotected acts of all organizations that

otherwise may engage in protected speech or association.

Indeed, in *Claiborne Hardware* the Court made it clear that "The NAACP – like any other organization – of course may be held responsible for acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified." 458 U.S. at 930 (citing *American Soc. of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982)).

Here, even though CAN never argued a defense or requested jury instructions based on *Claiborne Hardware* at the district court level, the judge's instructions to the jury and the evidence before the jury nevertheless met the standard set forth in *Claiborne Hardware*. Thus, *Claiborne Hardware* specifically permits liability for the acts of agents "that are undertaken within the scope of their actual or apparent authority." *Id.* Here, the jury instruction virtually tracked this requirement, as it provided:

> If you find that Shirley Landa was the agent of CAN and was acting within the scope of authority, then any act or omission of Ms. Landa was the act or omission of CAN. If you find that Ms. Landa was not acting within the scope of authority as CAN's agent, then you must find for CAN.

The evidence proved that Landa was acting fully within the scope of her authority. She was the Washington State contact person for CAN. According to CAN's President Rehling, "[C]ontact people are authorized to represent to members of the public that they are assisting on behalf of

CAN." Moreover, Scott demonstrated that CAN's asserted policy against illegal deprogramming was a sham. Indeed, Scott proved that CAN's national office itself hired individuals it knew to be illegal deprogrammers and made referrals to Rick Ross, even though both CAN's Board member Paul Martin and Ross himself acknowledged that Ross engaged in illegal deprogramming.

Claiborne Hardware also permits CAN to "be found liable for other conduct of which it had knowledge and specifically ratified." 458 U.S. at 930. Such knowledge and ratification was proven here. As the district court held, "CAN admitted to its control and supervision of its contact persons. CAN officials stated that these persons could be removed for violation of policy. However, Ms. Landa was not removed for violation of policy and remains a CAN contact person." Pet. at D-6.

Scott therefore demonstrated CAN's liability for Landa's actions under both sets of circumstances permitted under *Claiborne Hardware*: (1) Landa was an agent of CAN's acting within the scope of her authority, including in her participation in illegal deprogramming and (2) CAN authorized and ratified Landa's actions.

CAN relies heavily upon Judge Kozinski's dissent from the order rejecting the suggestion for rehearing *en banc*. With due respect, Judge Kozinski's concerns are based upon an exaggerated reading of an erroneous media report and not upon evidence in the record here. Not having been on the panel which thoroughly reviewed the district court record and the findings of the trial judge, Judge Kozinski evidently was unaware of the district court's explicit finding that CAN in fact did authorize or ratify the acts of its agent Landa, or of the substantial evidence supporting not only that finding but also the panel's

conclusion that Landa acted pursuant to CAN's *de facto* policy and practice (in contradistinction to its bogus "official" policy).[6/]

Finally, that CAN is a not-for-profit organization or that Landa was a volunteer does not relieve CAN of liability for her actions. The Court in *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), held a not-for-profit professional association liable for treble antitrust damages for the acts of a volunteer where the volunteer acted with apparent authority for the association. The Court noted that the association was in the best position to prevent further violations and held, "the fact that ASME is a nonprofit organization does not weaken the force of the antitrust and agency principles that indicate that ASME should be liable for [plaintiff's] antitrust injuries." *Id.* at 576. Notably, the Court in *Claiborne Hardware* relied upon the *ASME* case when it stated that, "The NAACP – like any other organization – of course may be held responsible

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[6/] As to Judge Kozinski's concern that the judgment in this case forced CAN into bankruptcy, it was CAN itself which filed for Chapter 11 reorganization and then voluntarily sought to convert the proceeding to a Chapter 7 liquidation, which CAN then successfully moved to dismiss. As the Seventh Circuit explained in an appeal arising out of CAN's bankruptcy, "This proceeding was a Chapter 7 liquidation . . . When the Cult Awareness Network chose to avail itself of Chapter 7 liquidation in order to have its (very substantial) debts forgiven, it forwent any realistic opportunity to control the disposition of the estate." *Cult Awareness Network* v. *Martino*, 151 F.3d 605, 609 (7th Cir. 1998). CAN plainly is not "out of business," as evidenced by the very fact that it is petitioning for redress here. Indeed, the Chapter 7 liquidation was dismissed and CAN continues to operate under the same leadership as before.

for acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." 458 U.S. at 930.

Because CAN's arguments here were not presented to the district court they are not appropriate for certiorari. Moreover, because stripped away from their repackaging, they are essentially arguments concerning the factual sufficiency of the evidence submitted below, and because the jury's decision was upheld after an independent review of the evidence by both the district court and the court of appeals panel, certiorari is not proper here.

3. *CAN's Argument That 42 U.S.C. §1985(3) Precludes Respondeat Superior Liability Is Not Only Incorrect But Irrelevant, Since CAN Was Found Liable For Its Policy and Practice*

CAN's argument that the court of appeals' decision conflicts with other precedent which holds that there can be no vicarious liability for a civil rights conspiracy under 42 U.S.C. §1985(3) is without merit and provides no basis for granting certiorari here. In any event, however, CAN's assertion is irrelevant, since the court of appeals explicitly found that CAN's liability under 42 U.S.C. §1985(3) is independently established under a theory of policy and practice liability. Once again, CAN's petition amounts to nothing more than a plea that the Court grant certiorari to review factual findings.[7/]

[7/] CAN cannot properly request that the Court determine that the policy and practice issue was not properly instructed to the jury, since CAN never raised the issue or requested a jury

CAN concedes that liability is proper where it can be shown that it was CAN's policy and practice to encourage illegal deprogramming. CAN contends that the evidence at trial was insufficient to demonstrate "any policy or practice of CAN knowingly referring persons to deprogrammers who engaged in *illegal* deprogrammings such as the one to which Mr. Scott was subjected." Pet. at 23-24 (emphasis in original). At trial, however, Scott demonstrated that CAN did indeed have a policy and practice of referring individuals to deprogrammers who it knew engaged in involuntary, illegal deprogramming. This included evidence that CAN made regular referrals to Ross, who was acknowledged by CAN Board member Paul Martin to engage in illegal deprogramming, as well as the testimony of Anson Shupe showing that CAN's public statements that it opposed illegal deprogramming were a farce.

This evidence established CAN's liability under cases such as *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), which held that municipalities may be held liable under 42 U.S.C. §1983 for the acts of a municipal employee acting pursuant to a municipal policy or practice. Here, Scott proved that, in the words of the court of appeals panel, "Landa acted in accordance with CAN's practice of referring people to involuntary deprogrammers" (Pet. at A-14), and therefore CAN is liable for Landa's actions.

It is therefore unnecessary for the Court to consider CAN's further contention that the panel's decision finding

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instruction at trial. Thus, CAN's petition necessarily is limited to the issue of whether the court of appeals erred in finding more than sufficient evidence in the record of CAN's *de facto* policy and practice of supporting and encouraging violent deprogramming.

CAN liable for conspiracy to violate Scott's civil rights under 42 U.S.C. §1985(3) conflicts with other precedent which, as CAN characterizes it, holds that there is no respondeat superior liability under §1985(3).

In any event, CAN's effort to portray a circuit conflict on the question is inaccurate. CAN completely disregards the dispositive distinction that the limitation on respondeat superior liability under §1983 derives from the language of §1983 itself, not present in §1985(3), and upon limitations on municipal liability which are not present in this §1985(3) action against a non-municipal defendant.[8/] As such, there is no basis for CAN's assertion and no grounds for granting certiorari here.

In *Monell* the Court held that a municipality may not be held liable under 42 U.S.C. §1983 for the actions of its employees solely under a theory of respondeat superior. The Court's holding was rooted in the language and legislative history of §1983 and is not applicable to §1985(3) claims against non-governmental entities. *See id.* at 691 ("[T]he language of §1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.").

The *Monell* Court began with a close reading of the

[8/] That §1985(3) has a different scope and focus than §1983 was, of course, the basis for the Court's decision in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), holding that §1985(3) does not encompass the state action limitations of §1983; "it is almost impossible to believe that Congress intended in the dissimilar language of the portion of §1985(3) now before us, simply to duplicate the coverage of," *inter alia*, §1983. *Id.* at 99.

original text of §1983. The Court explained that the statute "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Id.* at 692. The Court further held, however, that the "cause to be subjected" language of the statue precluded awarding damages on a respondeat superior theory of liability. Thus, the Court interpreted the term "cause" as it was used in §1983 so as to prohibit liability solely under the doctrine of respondeat superior.

"[E]qually important" to the *Monell* Court's analysis was Congress' understanding at the time of the act that federal imposition of respondeat superior liability on *municipalities* "would have raised all of the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional." *Id.* at 693. The Court's interpretation of the legislative history bolstered its conclusion that Congress did not intend §1983 to permit damages under a respondeat superior theory of liability against a *municipality*.

Neither of the grounds for the decision in *Monell* is applicable to a claim under §1985(3) to a private defendant, as presented here. The language of §1985(3) is substantially and materially different from the language of §1983,[2/] and

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[2/] Under §1985(3) the operative question is whether the defendants "conspire[d]" to deprive plaintiff of his rights. This is in contrast to claims under §1983 in which the relevant question is whether a state actor "cause[s]" a person "to be subjected to" such a deprivation. Thus, the interpretation of the term "cause," which *Monell* held precluded municipal liability under the respondeat superior doctrine, is irrelevant to this aspect

the concerns of Congress regarding the constitutional limitations on imposing liability on a municipality are wholly inapplicable to non-governmental defendants such as CAN.[10/] As the court of appeals noted, "The policy and practice limitation on municipal liability under §1983 shields governmental agencies from liability for unauthorized actions of its officers to a greater extent than traditional respondeat superior principles do; given this, to replace traditional principles of vicarious liability [exclusively] with a 'policy and practice' theory of liability with respect to private actors strikes us as suspect." Pet. at A-13.

CAN ignores the dispositive distinction, made in the cases it cites and by the panel, between governmental defendants and non-governmental defendants. Thus, seven of the eight cases cited by CAN for the proposition that there is no respondeat superior liability under §1985(3) concerned municipal defendants.[11/] Only one of CAN's cases, and that

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of conspiracy liability under §1985(3).

[10/] Indeed, §1985(3) originally was directed at the Ku Klux Klan. It would be anomalous indeed to hold that Congress' reluctance to hold municipalities vicariously liable for the acts of their agents under §1983 extended as well to the very organ of private violence at which §1985(3) was directed.

[11/] *See Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1272 (7th Cir. 1984) (county of Milwaukee not liable under 42 U.S.C. §1985 for actions of district attorney unless district attorney acted pursuant to custom, practice or policy); *Owens* v. *Haas*, 601 F.2d 1242, 1247 (2d Cir.) *cert. denied*, 444 U.S. 980 (1979) (county could not be liable for acts of prison guards pursuant to 42 U.S.C. §1985 under a respondeat superior theory); *Adams* v. *Pate*, 445 F.2d 105, 107 (7th Cir. 1971) (dismissing claims und[illegible]

a district court case, actually concerned the liability of a non-governmental actor, which was alleged to have conspired with a municipality. *Hankins* v. *City of Philadelphia*, 1998 U.S. Dist. LEXIS 5101 (E.D. Penn. Apr. 9, 1998). In *Hankins*, however, the *holding* upon which the court granted summary judgment dismissing the plaintiff's §1985(3) claim was that, as a factual matter, "plaintiff has not remotely sustained a claim of racial discrimination" or "racial animus," against *any* defendant or defendant's agent. *Id.* at 5138. It was only in a passing dicta in a footnote that the court conclusorily stated, without the slightest discussion or analysis, that "There is no respondeat superior liability under §1985(3)," relying again on cases involving *municipal* defendants. *Hankins*, thus, provides no reasoned basis for a grant of certiorari here.

Thus, CAN's contention that the Ninth Circuit's

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42 U.S.C. §§1983 and 1985(3) against prison warden); *Carnegie* v. *Miller*, 811 F. Supp. 907, 914 (S.D.N.Y. 1993) (dismissing §1985(3) claims against municipal defendants); *Howard* v. *Topeka-Shawnee County Metro. Planning Comm'n*, 578 F. Supp. 534, 538 (D. Kan. 1983) (dismissing §1985 claims against local planning commissions); *Westinghouse Broadcasting Co.*, v. *Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (denial of TRO application, stating there is no vicarious liability pursuant to 42 U.S.C. §§1983 and 1985(3) for actions of government officials); *Luke* v. *Abbott*, 954 F. Supp. 202, 202 n. 1 (C.D. Cal. 1997) (stating "*Monell* municipal liability doctrine" applies to claims under §1985 brought against county); *Meza* v. *Lee*, 669 F. Supp. 325, 326 (D. Nev. 1987) (dismissing §1983 claim against City and police of Reno); *Vazquez* v. *City of Reno*, 461 F. Supp. 1098, 1102 (D. Nev. 1978) (dismissing §1986 claim because municipality could not be liable under respondeat superior liability theory).

decision conflicts with other precedent is based entirely on CAN's failure to acknowledge the dispositive distinction between cases brought under §1983 against municipal defendants and this case brought under §1985(3) against a private defendant. Because there is no genuine conflict among the cases, there is no basis for granting certiorari.

4. *This Is Not an Appropriate Case for Determining the Limits of Class-based Discriminatory Animus under §1985(3)*

CAN argues that class-based animus against a religious group is not a valid predicate for liability under §1985(3). CAN "acknowledges that the Ninth Circuit did not pass upon the question whether a religious based animus can support a Section 1985(3) claim," (Pet. at 27), but fails to note that CAN *never raised this argument* until it sought rehearing *en banc* on appeal. The court of appeals properly ignored CAN's belated effort to raise the issue. Because it is a firmly established principle that, "[w]here issues are neither raised before nor considered by the Court of Appeals, [the Supreme] Court will not ordinarily consider them," CAN's petition for certiorari should not be granted here. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if the Court were to consider CAN's belated attempt to raise the question, there is no reason for the Court to reach out to decide the issue on this petition. Relying upon *Word of Faith World Outreach Center Church, Inc.* v. *Sawyer*, 90 F.3d 118 (5th Cir. 1996), CAN claims that a conflict in the circuits exists on the question whether class-based religious animus is grounds for liability under 42 U.S.C. §1985(3). In *Sawyer* the Fifth Circuit, conclusorily stated, without analysis, that only a conspiracy based on

racial animus is sufficient for liability under §1985(3). 90 F.3d at 124. The holding of every other circuit to have considered the question is to the contrary. *Compare Life Insurance Co. of N.A.* v. *Reichardt*, 591 F.2d 499, 505 & n.15 (9th Cir. 1979) (class-based religious animus is sufficient under §1985(3)); *Colombrito* v. *Kelly*, 764 F.2d 122, 130 (2d Cir. 1985); *Taylor* v. *Gilmartin*, 686 F.2d 1346, 1357-61 (10th Cir. 1982) *cert. denied*, 459 U.S. 447 (1983); *Ward* v. *Connor*, 657 F.2d 45, 48 (4th Cir. 1981) *cert. denied*, 455 U.S. 907 (1982).

The Fifth Circuit's conclusory statement does not reflect any considered analysis of precedent or of the statutory history of §1985(3) sufficient to justify this Court's plenary review of a question that otherwise seems settled among the circuits. Thus, in *Sawyer*, the Fifth Circuit merely cites its earlier decisions,[12/] which in turn purport to rely

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[12/] The earlier Fifth Circuit cases cited in *Sawyer* also do not reflect an analysis of the question whether a class based animus, such as religion, would qualify as a predicate to §1985(3) liability. *Sawyer* cited to *Green* v. *State Bar of Texas*, 27 F.3d 1083, 1088 n.8 (5th Cir. 1994), *Deubert* v. *Gulf Federal Savings Bank*, 820 F.2d 754, 757 (5th Cir. 1987) and *Rayborn* v. *Mississippi State Board of Dental Examiners*, 776 F.2d 530, 532 (5th Cir. 1985). In *Green*, the plaintiff alleged that defendants engaged in a conspiracy to interfere with plaintiff's business, because he was African-American. The *Green* court rejected his claim merely on the basis that he failed to allege that defendant's actions were motivated *solely* by race. The Court made no statement that other forms of class based animus could not be reached under §1985(3).

The other cases relied upon by *Sawyer* similarly do not definitively hold that animus under §1985(3) is limited to racial animus. Thus, *Rayborn* concerned an economically based

upon the Court's decisions in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) and *United Brotherhood of Carpenters and Joiners of America* v. *Scott*, 463 U.S. 825 (1983). But *Griffin* did, "not decide, given the facts of [that] case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of §1985(3)," 403 U.S. at 102, n.9. Rather, it left open the possibility that liability may exist where there is some "otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. Likewise, although *Scott* held that §1985(3) does not encompass conspiracies that arise out of an animus based on economic views, it too declined to decide whether conspiracy motivated by an invidiously discriminatory intent other than racial bias would be actionable under §1985(3).

Cases that have thoroughly considered the matter have concluded that religiously based animus is a proper ground for liability under §1985(3). Thus, in *Life Insurance*

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conspiracy; the court properly held that the claim was barred by the Court's decision in *United Brotherhood of Carpenters* v. *Scott*, 463 U.S. 825 (1983). *Rayborn's* statement that "[t]he conspiracy must be race based to state a cause of action for violation of §1985," 776 F.2d at 532, in context, did not purport to be a definitive holding on the limits of §1985(3). Similarly, in *Deubert*, also cited in *Sawyer*, the court conclusorily stated that it was "well established" in the Fifth Circuit that "the only conspiracies actionable under §1985(3) are those motivated by racial animus," relying upon *Rayborn*, as well as *Daigle* v. *Gulf State Utilities Co.*, 794 F.2d 974, 978-79 (5th Cir. 1986) *cert. denied*, 479 U.S. 1008, which concerned animus based upon the plaintiff's status as a "scab," which the court held was indistinguishable from the economically based animus held not actionable by *United Brotherhood of Carpenters*.

Co. of N.A. v. *Reichardt*, 591 F.2d 499, 505 & n.15 (9th Cir. 1979), the Ninth Circuit held, "Section 1985's drafters clearly intended to protect groups other than oppressed southern blacks. The congressional debates evinced concern for all groups subject to the organized lawlessness of the Ku Klux Klan, including all Unionists, Republicans, and certain religious groups."

More recently, in *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993), the Court again did not specifically answer the question whether animus other than racial animus was sufficient but stated:

> The nature of the 'invidiously discriminatory animus' *Griffin* had in mind is suggested both by the language used in that phrase ('invidious . . . [t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating.' Webster's Second International Dictionary 1306 (1954)) and by the company in which the phrase is found ('there must be *some racial or perhaps otherwise class-based*, invidiously discriminatory animus').

506 U.S. at 274 (citing *Griffin*).

Plainly, the animus demonstrated here, based as it was in an objection to Scott's participation in a fundamentalist Pentecostal church, meets the standard of "invidiously discriminatory animus" formulated in *Bray*. A grant of certiorari to address this question, not presented below, is not appropriate here.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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No. 98-878

IN THE
Supreme Court of the United States

October Term, 1998

CULT AWARENESS NETWORK,

Petitioner,

vs.

JASON SCOTT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED ON THE WRIT DO NOT REQUIRE DETERMINATION OF DISPUTED FACTS

Petitioner, Cult Awareness Network, Inc. ("CAN") submits this reply in support of its petition for writ of certiorari to address what appears to be the principal basis for respondent Scott's opposition brief. Namely, respondent seeks to characterize issues before the Court as ones requiring the determination of disputed facts. That characterization is not accurate. By so limiting this response, petitioner should not be deemed to accept any of the other arguments raised by respondent. As set forth in the petition for certiorari, petitioner respectfully requests that certiorari be granted on all three questions presented.

Behind the inflamed rhetoric, hyperbole and incessant recitation of facts irrelevant to the issues for which petitioners seek certiorari, lies a very simple straightforward fact pattern upon which respondent seeks to tie CAN to the illegal acts upon which liability is based. This simple fact pattern was set forth by the Ninth Circuit panel (Cert. Pet. A-8 - A-10) and is acknowledged by respondent once one

pierces through the irrelevancies of respondent's brief in opposition to certiorari. Petitioner accepts and acknowledges that the Ninth Circuit has accurately described the factual record in this case. That record is not, contrary to respondent's protestations, subject to dispute. Resolution of the issues for which petitioners seek certiorari will not require this Court to resolve a single factual dispute.

The questions presented in the petition address whether this undisputed fact pattern can form the basis for imposition of liability against an advocacy organization such as CAN consistent with the First Amendment or with the limitations on imposition of vicarious respondeat superior liability under 42 U.S.C. §1985. The Ninth Circuit's decision affirming the imposition of liability is not only inconsistent with this Court's prior decisions, but is also in the words of Judges Kozinski, Pregerson, Reinhardt, Kleinfeld, Hawkins, Tashima, and McKeown "a great leap backwards in First Amendment freedoms" with the potential

to silence the message of numerous advocacy organizations across the country. (Cert. Pet. B-1, B-8)

In summary, the factual record establishes that Shirley Landa referred Rick Ross, a deprogrammer, to Kathy Tonkin. Ross initially performed legal deprogrammings of Tonkin's minor children and then later performed the illegal deprogramming of Scott, Tonkin's eldest son. CAN's alleged liability is based on the following facts: Landa was a volunteer contact person for CAN for the state of Washington. Landa was a former Board member of CAN. CAN acted through its contact people. CAN did refer people to deprogrammers. A CAN national employee had referred other people to Ross, but believed Ross only performed involuntary **legal** deprogrammings. Ross solicited referrals from CAN and attended CAN conventions. CAN took no action with respect to Landa after the events at issue. That is it. There is no evidence of record that Tonkin was reaching out to CAN to seek a referral, that Landa believed or stated she was acting on behalf of CAN in making the referral to

Tonkin, that any CAN officer, director or employee was aware of, in fact authorized, or in fact ratified the referral of by Landa of Ross to Tonkin, or that any CAN officer, director or employee was aware of, in fact authorized, or in fact ratified the **illegal** deprogramming of Scott. Respondent does not and cannot assert facts to the contrary.[1]

In light of the factual record, petitioner's certiorari petition raises important questions regarding the application of *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) and 42 U.S.C. § 1985 to efforts to impose liability on advocacy organizations. These questions are important as more

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[1] Perhaps recognizing the weakness of this factual scenario, respondent resorts to misrepresentation of facts in its brief in opposition. For example, respondent claims that Landa identified herself as a CAN representative to Tonkin. That evidence is nowhere in the record, is contrary to the testimony of both Tonkin and Landa and is not referenced by the Ninth Circuit. Second, respondent asserts that Paul Martin was a CAN Board member and co-conspirator at the time of the events in question. In fact, Mr. Martin was not a CAN Board member at the time of the events in question.

and more individuals and organizations seek to silence advocacy organizations through the imposition of crippling damage awards based on tenuous links between the illegal conduct at issue and the organization.

Accordingly, this case presents the opportunity for this Court to determine whether liability may be imposed on an organization that advocates, through policy or practice, controversial legal actions when a volunteer for the organization carries out that policy in an illegal way. Here, the evidence demonstrated that CAN had a policy of making referrals to deprogrammers who conduct involuntary deprogrammings. (Ninth Cir. Maj. Op., Cert. Pet. A-9, A-10) But not all involuntary deprogrammings are illegal. As the Ninth Circuit recognized, involuntary deprogrammings of minors are legal. *Id.* at A-9. The Ninth Circuit did not find, nor is there evidence, that CAN had a policy or practice of making referrals to deprogrammers who performed illegal involuntary deprogrammings. As Judge Kozinski noted: "There is a big difference between advocating an activity

when it is lawful and advocating the same activity when it is unlawful." (Cert. Pet. B-6) For example, an anti-abortion group may well have a policy encouraging picketing of abortion clinics. But such picketing can be carried out in a legal or an illegal fashion. Liability should not be imposed against the organization simply because one of its volunteers on a specific occasion pickets by way of an illegal trespass into the abortion clinic unless the organization had knowledge of or ratified the illegal picketing activity at issue. Liability should not be imposed on organizations such as CAN unless there is a "finding that [CAN] authorized . . . or ratified unlawful conduct. . . . " *NAACP v. Claiborne Hardware*, 458 at 930-31.

The case also presents the opportunity to determine whether, under *NAACP v. Claiborne Hardware*, *supra*, and 42 U.S.C. § 1985, the fact that liability is being imposed against a non-profit advocacy organization based on the acts of a part-time volunteer, rather than a paid employee, requires an enhanced evidentiary burden for imposing

vicarious agency liability. As *Amicus Curiae,* American Family Foundation, et al., point out there is a significant legal difference between the acts of a servant/employee and the acts of a volunteer. The servant/employee by the nature of the relationship is subject to the right of control by the employer over the details of his physical conduct. *See*, Brief *Amicus Curiae*, at pp. 11-12; W. Page Keeton, *et al.*, Prosser and Keeton on the Law of Torts, §69 (5th Ed. 1984). Imposing vicarious tort liability for the illegal acts of the servant/employee is justifiable because of the presumption of control and benefit by and to the employer for acts committed by the employee during the course of the employment relationship. These presumptions do not apply in the context of a volunteer working on behalf of a non-profit organization. To the contrary, application of a presumption against agency, as urged by *Amicus Curie*, Brief at pp. 13-14, makes sense and is consistent with the heightened standards for imposing liability against advocacy organizations under the First Amendment.

The point here is not, as respondent suggests, to relieve non-profit organizations per se from vicarious liability. Rather, the point is that a heightened burden of evidence linking the non-profit advocacy organization to the illegal acts of its volunteer members is required before vicarious liability can be imposed. That heightened burden cannot be sustained here based on the facts of record.

Respectfully submitted,

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